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# Executive Interview: An Interview with Dennis Wilcox

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# Executive Interview

## An Interview with Dennis Wilcox

Conducted by Daniel Rascher

Dennis Wilcox is a principal with Climaco, Lefkowitz, Peca, Wilcox & Garofoli Co., L.P.A. where he has practiced law since 1977. He chairs the firm's Business and Transactional Practice Group and supervises transactional, commercial litigation, and general business matters. He also heads the firm's public finance/municipal bond practice, where he has participated in over \$4.5 billion in public financing transactions since 1979. Wilcox also has extensive experience in transactional work for private and public clients in the areas of finance, real estate, securities, and bankruptcy. He has had a variety of litigation experience, including commercial, education, and employment law litigation, for private and public clients.

He and his firm currently act as general counsel to the Cleveland-Cuyahoga County Port Authority and Gateway Economic Development Corporation of Greater Cleveland. While serving as counsel to the Port Authority, he has had an integral role in numerous complex transactions, including the financing for the new Cleveland Browns Stadium, the development of the Rock and Roll Hall of Fame and Museum, the Applied Industrial Technologies and MTD Headquarters projects, the acquisition of the C&P Ore Docks and the Old River properties on the lakefront, and financings for the Cleveland Clinic involving a new office and parking structure and the new Stem Cell Research Center on the Clinic Main Campus in Cleveland.

As counsel to Gateway he was involved in all aspects of the financing, construction, lease negotiations, and development of Jacobs Field and Quicken Loans Arena (formerly Gund Arena) in downtown Cleveland.

He also served as counsel to Sports Facilities Marketing Group for the Nationwide Arena Project in Columbus, Ohio, respecting the sale of premium seats and seat licenses necessary to finance that facility.

Wilcox received his J.D. degree from Case Western Reserve University in 1987, Order of Coif, and his Bachelor of Arts Degree in 1974 from Ohio State University, cum laude.

He is a member of the Bar of the State of Ohio and the District of Columbia and is a member of numerous district and U.S. appellate courts. He is a member of the American, Ohio, and Cleveland Bar Associations and the National Association of Bond Lawyers.

He is active in his community and currently serves as a member of Council for the City of Cleveland Heights, Ohio, where he chairs the Planning & Development Committee.

### Role and Trends

*Q: What is the Gateway Economic Development Corporation and what is its role in sports finance in Cleveland?*

A: Gateway Economic Development Corporation of Greater Cleveland is a non-profit corporation organized under the laws of the State of Ohio pursuant to a specific statute that authorizes a non-profit corporation to enter into cooperative agreements with counties and cities to acquire, construct, renovate, equip, lease, manage, or operate a sports facility. Thus, Gateway was the pivotal entity created to oversee the acquisition, construction, financing, and management of the Gateway Sports Complex in Cleveland, Ohio. Gateway was actually formed in 1990 after the voters of Cuyahoga County approved an excise tax or "sin tax," which permitted the taxing of alcoholic beverages and tobacco products for the purposes of financing a sports facility. With that levy in place, the City and the County then appointed the Board members to the non-profit Gateway Corporation

and entered into a Cooperative Agreement with that entity so that Gateway could acquire, finance, construct, and manage the sports facility, which in this case consists of Jacobs Field, the home field of the Cleveland Indians, and Quicken Loans Arena (formerly Gund Arena), the home court for the Cleveland Cavaliers.

Gateway successfully completed construction of these facilities in time for the 1994 Major League Baseball season and the 1994-1995 National Basketball Association season. Today, Gateway has eight employees that manage the common areas, which encompass the areas of ingress and egress surrounding the facilities, several private streets that are blocked off during events, a plaza outside the ballpark, and a larger plaza between the facilities where events and activities can be held. These employees provide security and maintenance supervision and oversee facilities upkeep with the teams to ensure capital needs of the facilities are maintained. The bulk of the actual security, cleaning, and maintenance work is contracted to local firms.

**Q: What are the essential skills needed for your job and what are the major challenges?**

A: As General Counsel to Gateway, the legal skills involved include knowledge of public law and public finance, contract law, real estate and construction law, and skills of a general counsel to an organization responsible for a \$400 million development.

The Gateway Project required negotiation not only with two professional sports teams to finalize their lease and other relational agreements with Gateway, but also negotiation among various governmental entities to successfully conclude the Cooperative Agreement and other structures of the political arrangement among Gateway, the County and the City, as well as the State, which provided significant funding for the project. Also, working and obtaining the cooperation and support of the corporate, business and labor communities was an important part of the project.

Finally, the constant challenges of completing a dozen or so financings, managing construction, and meeting the time deadlines was a true challenge.

**Q: What are the recent trends in sports finance?**

A: When the Gateway transaction began in 1990 there were initially a series of industrial development bonds

issued, which were grandfathered as tax-exempt in the tax code (which changed in 1986). Since that time tax-exempt IDBs are not available to finance sports facilities. As a result, communities have looked to other techniques to provide tax-exempt financing, including finance structures where the entirety of debt repayment comes from the public, and thus avoiding the private activity bond tests. This has obviously put a strain on some communities' public budgets and has been somewhat controversial as the proliferation of sports facilities had occurred over the last decade and a half. These techniques have required the use of different financing structures and ownership models for the sports facilities, including the Certificate of Participation model, which was used to finance the Cleveland Browns Stadium using the Cleveland-Cuyahoga County Port Authority as the ground lessee from the City of Cleveland, which in turn leases the facility to the city and ultimately to the Cleveland Browns.

## Details & Examples

**Q: Take us inside a deal, such as your work involving Quicken Loans Arena and Jacobs Field. What were the key elements? How did you choose the sources of finance?**

A: The Gateway transaction involving the Cleveland Indians and Cleveland Cavaliers was somewhat unusual, although certainly not unique, in that it involves two separate professional sports teams in Cleveland in the same sports complex. What made the Cleveland transaction unusual in particular was that the Cleveland Indians were tenants in a downtown stadium, with Cleveland Browns as the landlord, and were anxious to move into a sole-purpose facility, while the Cleveland Cavaliers actually owned an arena in another county and were located between Akron and Cleveland. There was a question of whether or not the Cavaliers were interested in moving back to downtown Cleveland. However, the city and the county insisted that the Gateway project include both teams in order to maximize the amount of related economic development from the project. Thus, we had two teams with two completely separate motivations for becoming involved in the project.

The first challenge was to obtain written understandings with the teams to ensure that they would be willing

to occupy the facilities if the financing package and construction of appropriate facilities could be achieved. The business community worked with the city, the county, and the teams to convince them that the Gateway complex was the right approach.

Next, a site needed to be selected. Fortunately, a non-profit group had been formed in the 1980s with the thought of building a domed stadium in downtown Cleveland. Although that project was not successful, the non-profit entity had been successful in acquiring the bulk of the property that would become the Gateway site and on which both an arena and a baseball facility would be built.

Once it was determined that there was a sufficient site for the facilities and the teams were indeed interested, then a public-private financing structure was developed. The mode of public financing chosen was that of an excise or sin tax, which had not been utilized in Ohio before for this purpose. This required special legislation by the Ohio legislature to permit the voters of the county to authorize such a tax for use in building a sports facility.

In May of 1990, the voters narrowly approved this 15-year sin tax for purposes of building a sports facility for professional sports teams.

That was really just the beginning as the construction budget pushed the financing needs of the project beyond those originally anticipated and lease negotiations became more difficult as a result.

***Q: How much was the gap between the original and final budgets and what specifically was done to close the gap?***

A: The funding gaps were a moving target since the original budget estimates were prepared before even retaining architects. However, beyond the \$150 million sin tax bonds, there were about a dozen other funding sources, both private and public. The most significant was the commitment from the county to fund up to \$120 million through non-tax revenue bonds. The county ended up issuing bonds for the full amount of that commitment. The total budget with those bonds in place, the sin tax bonds, state loans and grants, use of sin tax proceeds during construction, team contributions, etc., was \$434,000,000. The final construction costs exceeded that budget by about \$20,000,000, or about 5%, which was paid through loans from the county and local foundations.

***Q: Take us inside another deal, such as your work involving Cleveland Browns Stadium. What were the key elements? How did you choose the sources of finance?***

A: The Cleveland Browns project in essence had its origins in the Gateway transaction when the Indians moved out of Cleveland Municipal Stadium and into Jacobs Field in 1994. The owner of the Cleveland Browns at that time was looking for a renovated or a new stadium and negotiations were just beginning with the community when the owner unexpectedly moved the team to Baltimore. The community, led by Mayor White, over the next several years worked with the NFL to provide another NFL franchise to Cleveland. As part and parcel of that proposal, a new stadium was required. The original Cleveland Municipal Stadium was built in 1933 and it had outlived its useful life. Moreover, because the goal was to bring in a team as quickly as possible, there was not a luxury of time to find alternative sites. As a result, it was concluded that the most efficient site would be the original lake-front site, which would require demolition of the Cleveland Municipal Stadium that was owned by the city of Cleveland.

The negotiations with the NFL resulted in the NFL actually holding the Cleveland Browns franchise “in escrow” and thus the city of Cleveland was in the unique position of negotiating with the NFL as the owner of the Browns franchise. As counsel to the Cleveland-Cuyahoga County Port Authority, we became involved in the financing structure that was necessary to make this project a reality. Although the city was willing to provide a number of tax sources, such as a parking tax and a rental car tax, to provide sufficient funding for bonds, the debt limits under Ohio law became an issue with financing a facility of \$150,000,000 to \$200,000,000. As a result, a Certificates of Participation financing structure was developed whereby Cleveland-Cuyahoga County Port Authority would actually own the ground through a ground lease from the city upon which the stadium was situated. The Port Authority would then lease the facility to the city of Cleveland, which would enter into a sub-lease with the Cleveland Browns for playing its football games. Because the funding for the bonds would be paid from the city of Cleveland based on an annually appropriated lease payment and not the Cleveland Browns, it

could be a bond issue where interest on the bonds was exempt from federal incomes taxes.

As another twist in this financing and as a result of some lessons learned from Gateway, it was determined to extend the sin tax for an additional 10 years for purposes of the Browns Stadium, in part to provide a capital maintenance funding source for that facility.

**Q: Tell us about the issues involved in creating a lease for a sports franchise, and the particulars involved in the leases that are most difficult to finalize.**

A: Probably the most difficult issue is managing the expectations of the community on the one hand and the owner of the sports franchise on the other. Our experience is that when there is a balance between the public and private parties, the best result is obtained. Thus, it is important to carefully allocate the sources of revenues available to the public for repayment of bonds, for capital improvements, and for other operating costs versus the revenue needs of the team for its operational success. As part of that allocation, responsibilities for various activities including day-to-day operations, capital repairs, and other issues must be resolved. One issue in particular that has become more and more important is the allocation of premium seating and seat license revenues. In many cases the seat licenses and premium seat revenues are used, in part, to finance the sports facility. In other cases the owners prefer to keep that revenue and pay a flat rent or ticket-based revenue. Because these revenue sources are critical in new sports facilities, the allocation of those revenues and their use is sometimes most contentious.

**Q: Describe the lease situations with the Cavaliers and Indians and how those changed after renegotiation.**

A: The lease negotiation with the Cavaliers and Indians resulted in quite different structures whereby the Indians' revenues under their lease were tied to season ticket sales and scoreboard advertising revenues, with a portion of the premium seat revenue being dedicated for 20 years for financing original construction costs. Also, the Indians dedicated certain prepaid suite and premium seat revenues to construction. The Cavaliers, on the other hand, dedicated a portion of their ongoing suite and premium seat revenues for rent. In both cases the capital repairs were the responsibility of Gateway, but as it turned out, there were not sufficient revenues under the

leases available to meet those needs. As a result, in 2004 the Cavaliers, the Indians, and Gateway each entered into a Memorandum of Understanding ("MOU") modifying the lease whereby a flat rent concept was agreed to, which is based on the budgetary needs of Gateway to meet its maintenance, security, and operational obligations. Gateway prepares an annual budget that is then approved by the teams. Any disputes (there have been none at this point) can be resolved through mediation/arbitration. The teams then pay monthly or quarterly rent payments based on the budget. With one exception, the teams pay for all of Gateway's obligations through their rent payments. That exception is an important one and it involves major capital repairs that Gateway has agreed to work with the city and the county to address. Currently there are no anticipated major capital needs in the facilities for a number of years.

**Q: How has eminent domain played a role in your career and where do you see that issue going?**

A: The issue of eminent domain and sports finance was not implicated in the Browns Stadium Project; however, in the Gateway Project, the city of Cleveland required the use of eminent domain to acquire several of the properties, although the bulk of the property was acquired privately. In light of the recent U.S. Supreme Court decisions in *Kelo*, the use of eminent domain for projects such as these can still be accomplished. However, in reaction to *Kelo*, various states have passed laws restricting eminent domain and in Ohio the Supreme Court recently issued its opinion in the *Norwood* case, which indicates that eminent domain solely for the purpose of economic development purposes is not permitted. The eminent domain laws thus are in the state of flux, although in a properly structured transaction still may be useful for site acquisition.

**Q: What has sometimes been overlooked in sports finance projects that becomes an issue after the deal is done?**

A: Probably the easiest thing to underestimate in negotiations is long-term capital maintenance needs. Because of the pressures to meet the construction budget and the limited resources available from the public and the sports owner to build the project, oftentimes the long-term capital needs of the facilities are difficult to estimate and fund. Although it was the intent of Gateway to create capital reserves through a capital repair deposit and capital

repair fund, the revenues for that were not available from the rental payments that materialized. As a result, in the Cleveland Browns Project, a separate funding mechanism was set up initially to deal with capital repairs needs.

It is in everyone's best interest to impose the discipline early in negotiations and to insist on a capital repairs fund that should be funded immediately and built up over the long term of the project that is available for major capital needs of the facility, which can arise as early as five to 10 years out from the construction of the facility.

In lieu of that, the public entity or sports owner should be prepared to finance major improvements on an on-going basis and to do major renovations based on a capital repair schedule that is reviewed by professional engineers on an annual basis.

*Q: There is often an issue about how much of a facility is being financed by a franchise versus the public. Sometimes the franchise pledges naming rights revenues as part of its private financing. Yet, it is not always clear that the franchise has the right to naming rights revenues. What are your thoughts on this?*

A: In the Gateway Project the naming rights revenues were pledged as part of the monies available for construction. The naming rights were actually purchased by the owners of the sports franchises as opposed to a separate corporation. In the Gateway example, the period of time for the naming rights was clearly delineated and there were periods of time for which the naming rights would again become available for resale by Gateway. As part of the renegotiation of those leases in the MOU process, those naming rights of Gateway were relinquished.

*Q: In general, what criteria are used to pick the public financing sources used for a project from among the many available (e.g., hotel, restaurant, car rental, sin, sales, general fund, etc.)?*

A: Obviously the easiest bond to sell is a general obligation bond of a governmental body, followed closely by a tax-backed bond. That doesn't mean that those sources should be the only ones used to provide the public financing on a stadium or arena project. In most cases we find that it is a combination of various sources of revenues that make the projects work. Each of them has their own inherent difficulties. For example, hotel and restaurant taxes are cyclical and a good feasibility analysis is

required before relying on these sources. Sin taxes that are based in part on tobacco sales show a declining return on an annual basis.

In sum, a good financial advisor or underwriter is required to help put the financing package together that will work for that particular project.

## Future

*Q: What are some of the big unanswered questions in sports finance to which you wish you had answers?*

A: Some of the issues that I think are going to be confronting sports franchises in the future are the ability to maintain revenues from their suites, premium seats and seat licenses, naming rights, and other revenue sources. Although when a new stadium or arena is built the community usually comes forward and purchases the premium seats, advertising, etc., as years go on and as some teams have difficulty competing, the projections for increased revenues from those sources may become bigger problems than anyone could anticipate.

*Q: Similarly, what are the most critical research needs in the area of sports finance?*

A: I think good market studies of the region are important to determine the long-term sustainability of the revenue projections, including the tax-backed obligation issued to finance the facility. I also think we need more research on the economic impact of sports facilities on a community. We often underestimate the amount of income tax, admissions taxes, sales tax, and property tax generated not only from the sports facility, but the surrounding businesses.