June 14, 1996

OPINION NO. 96-037

The Honorable Keith A. Shearer
Wayne County Prosecuting Attorney
Suite 201 Silver Building
132 South Market Street
Wooster, Ohio 44691

Dear Prosecutor Shearer:

I have received your letter asking whether, pursuant to the provisions of R.C. Chapter 1711, a county agricultural society may lawfully include in a contract with fair exhibitors and vendors a provision such as the following:

> The Fair Association reserves the exclusive rights, at any time, without notice, to enter into contracts with various vendors and suppliers to be the exclusive vendors of any items or products to be used by the exhibitor/vendor on the fairgrounds, including contracts for bread products, soda pop, meats, dairy products, and various other food stuffs and retail products offered for sale by the exhibitor/vendor. The exhibitor/vendor agrees to fully comply with these exclusive arrangements that are made by the Fair Association.

Your question is whether such a provision would be considered a restraint of trade or a violation of any other state or federal law.[1]

You have informed one of my staff attorneys that your local county agricultural society is considering including in exhibitor and vendor contracts for the county fair a provision such as the one quoted above. The society would then enter into contracts with local suppliers of various foodstuffs and other products, granting the suppliers exclusive rights to sell their products to fair exhibitors and vendors. Such contracts could provide a source of income to the county agricultural society and could benefit local suppliers. It is possible that, by selecting an exclusive supplier, the

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[1] You have not asked about civil remedies, such as possible actions in contract or tort, and this opinion does not address such matters.

county agricultural society could procure convenient delivery and service schedules for the fair. It is apparent, however, that such an arrangement would restrict the ability of the exhibitors and vendors to obtain products from suppliers of their choice. The arrangement could interfere with the relationships that the exhibitors and vendors have with the suppliers that they have used in the past and to whom they might have contractual obligations. Further, the prices charged by the exclusive suppliers might exceed prices that the exhibitors and vendors could obtain elsewhere, and the quality might differ. Thus, the exhibitors and vendors are concerned that such a provision could have a negative impact on their operations.

I note first that I am unable, by means of a formal opinion, to review particular contractual provisions and guarantee their validity. *See, e.g.*, 1992 Op. Att'y Gen. No. 92-016; 1990 Op. Att'y Gen. No. 90-111 at 2-502; 1989 Op. Att'y Gen. No. 89-010 at 2-40. I cannot provide assurance that specific contractual language is subject to no legal challenge. I can, however, provide a general discussion of the legal principles governing restraint of trade and the contract proposal set forth above.

Provisions of Ohio law relating to monopolies and contracts in restraint of trade appear in R.C. Chapter 1331, which was originally enacted in 1898 and is known as the Valentine Act. *See List v. Burley Tobacco Growers' Co-op. Ass'n*, 114 Ohio St. 361, 369, 151 N.E. 471, 474 (1926). Ohio's Valentine Act was patterned on the federal Sherman Act, 15 U.S.C.A. §§1-7 (West 1973 & Supp. 1996). *Id*. at 369-70, 151 N.E. at 474. Both laws incorporate basic principles of common law prohibiting transactions that are harmful to the public. *Id.* at 375-77, 151 N.E. at 475-76.

Both state and federal law contain broad restrictions against activities that restrain trade. Ohio law states flatly that a trust "is unlawful and void" and defines a trust to include "a combination of capital, skill, or acts by two or more persons" for the purpose of "creat[ing] or carry[ing] out restrictions in trade or commerce." R.C. 1331.01; *see also* R.C. 1331.06. Ohio law specifically prohibits any person from forming "a combination to control the price or supply, or to prevent competition in the sale of bread, butter, eggs, flour, meat, or vegetables." R.C. 1331.05. Federal law states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C.A. §1 (West Supp. 1996).

Those general restrictions, however, have been construed as incorporating a rule of reason. As the Ohio Supreme Court stated: "Contracts in restraint of trade are not illegal except when unreasonable in character. When such contracts are incident and ancillary to some lawful business and are not unreasonable in their scope and operation they are not illegal." *List v. Burley Tobacco Growers' Co-op. Ass'n*, 114 Ohio St. at 361, 151 N.E. at 471 (syllabus, paragraph 4). The test to be applied, therefore, is whether the restraint of trade is incident and ancillary to some lawful business or is unreasonable in its scope and operation and therefore illegal. *See C.K. & J.K., Inc. v. Fairview Shopping Center Corp.*, 63 Ohio St. 2d 201, 407 N.E.2d 507 (1980). A similar rule of reason applies under the Sherman Act. *See Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 343 (1982) ("the rule of reason requires the factfinder to decide whether under all the circumstances of

the case the restrictive practice imposes an unreasonable restraint on competition"); *see also Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

Whether a particular contract imposes an unreasonable restraint of trade is a matter for judicial determination in light of the circumstances of each case. *See Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 731 (1988) ("[t]he term _restraint of trade_ ... refers not to a particular list of agreements, but to a particular economic consequence, which may be produced by quite different sorts of agreements in varying times and circumstances"); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). My review of applicable law suggests, however, that a provision of the sort in question may be found reasonable and not an unlawful restraint of trade.

In general, contracts of the sort proposed are unreasonable only if they foreclose competition in a substantial share of the relevant market. *See Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1300 (9th Cir.), *cert. denied*, 459 U.S. 1009 (1982). The suggested contractual provision would eliminate competition at the fair with respect to the products for which exclusive rights are granted and might cause injury to particular businesses. The fair, however, lasts for a limited period of time and covers limited space. There are many other venues in which competition for products may occur.[2] While a particular exhibitor or vendor may be restricted in its ability to sell a particular product at the fair, that restriction in itself does not appear to constitute an unreasonable restraint of trade in violation of the Valentine Act or the Sherman Act. Contracts for exclusive rights to supply products for sale by exhibitors and vendors are common in the amusement industry, and there may be competition among suppliers seeking those rights. *See generally Twin City Sportservice, Inc. v. Charles O. Finley & Co.* Thus, it appears that contracts of the sort in question will not necessarily result in unlawful restraints of trade. *See, e.g., Dos Santos v. Columbus-Cuneo-*

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[2] The "essential facility" doctrine states that, where facilities cannot practicably be duplicated, those who possess them must share them on fair terms. *See Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978). Even if there is a single county fair, however, it is likely that there will be similar events at which concessions are sold. The proposed arrangement does not restrain any competitors of the county agricultural society. Therefore, it does not appear that the essential facility doctrine would preclude the county agricultural society from entering into exclusive arrangements for the provision of products to fair exhibitors and vendors. *See, e.g., Smith v. Northern Mich. Hosps., Inc.*, 703 F.2d 942, 953 (6th Cir. 1983).

Cabrini Medical Center, 684 F.2d 1346 (7th Cir. 1982). *See generally Holt v. Good Samaritan Hosp. & Health Center*, 69 Ohio App. 3d 439, 590 N.E.2d 1318 (Montgomery County 1990), *motion overruled*, 58 Ohio St. 3d 701, 569 N.E.2d 504 (1991). Whether a particular factual situation involves an unreasonable restraint of trade must be determined on a case-by-case basis. *See Dos Santos v. Columbus-Cuneo-Cabrini Medical Center*.

It is common knowledge that various activities and facilities obtain funding by selling the right to be exclusive seller or supplier of particular products. *See, e.g., Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285 (9th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986). In a highly-publicized action in 1992, the Ohio Controlling Board approved a contract under which Pepsi was given the exclusive right to provide carbonated beverages to the Ohio State Fair. *See* Columbus Dispatch, June 30, 1992, at 1A. While that contract was not tested by the courts, its existence and Controlling Board approval indicate a determination on the part of state officials that the purpose of the contract was incident and ancillary to the lawful business of operating the Ohio State Fair and was not unreasonable. It appears, therefore, that, on a state level, a contractual provision establishing an exclusive supplier of particular items has been accepted as a reasonable part of the operation of a fair. *See also Associations, Conventions, Trade Shows, Inc. v. Ohio Expositions Comm'n*, Nos. 88AP-784, 88AP-886 (Ct. App. Franklin County May 18, 1989), *motion overruled*, 45 Ohio St. 3d 711, 545 N.E.2d 906 (1989).

For the reasons outlined above, it cannot be concluded as a matter of law that a contractual provision of the sort you have proposed will necessarily constitute an unlawful restraint of trade. I conclude, therefore, that statutory restraint-of-trade provisions do not as a matter of law prevent a county agricultural society from requiring that exhibitors and vendors purchase foodstuffs or other products for use or sale at the county fair from vendors who are designated as exclusive suppliers. The validity of particular contracts, however, must be determined on a case-by-case basis. *See Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992).[3]

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[3] If it were found that the contract in question constituted an unreasonable restraint of trade, it would be necessary to consider whether the county agricultural society is exempt from the Valentine Act and the Sherman Act. Exemptions from antitrust provisions have been recognized for governmental entities and for private entities that act pursuant to a state policy and are subject to state regulation. *See, e.g.*, 15 U.S.C.A. §§34-36 (West Supp. 1996) (Local Government Antitrust Act shields local governmental entities from money damages in suits under federal antitrust law); *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365 (1991); *Bloom v. Hennepin County*, 783 F. Supp. 418 (D. Minn. 1992); *Hillman Flying Service, Inc. v. City of Roanoke*, 652 F. Supp. 1142 (W.D. Va. 1987), *aff'd without op.*, 846 F.2d 71 (4th Cir. 1988); *Thaxton v. Medina City Bd. of Educ.*, 21 Ohio St. 3d 56, 488 N.E.2d 136 (1986); *City of Stow v. Summit County*, 70 Ohio App. 3d 298, 590 N.E.2d 1363 (Summit County 1990), *motion overruled*, 59 Ohio St. 3d 701, 571 N.E.2d 134 (1991).

A county agricultural society is a private entity with statutory authorization to perform limited public functions. *See* 1987 Op. Att'y Gen. No. 87-057; 1984 Op. Att'y Gen. No. 84-026. It is created and organized as a private association or corporation. *See* R.C. 1711.01, .06-.081; *Dunn v. Agricultural Soc'y*, 46 Ohio St. 93, 18 N.E. 496 (1888); *Chaney v. Clark County Agricultural Soc'y*,

Inc., 90 Ohio App. 3d 421, 629 N.E.2d 513 (Clark County 1993); 1988 Op. Att'y Gen. No. 88-026; 1983 Op. Att'y Gen. No. 83-035; 1940 Op. Att'y Gen. No. 2454, vol. I, p. 614. A county agricultural society operates the county fair, which is an activity directed and supported by the State of Ohio. *See* R.C. 1711.01, .10; *Board of County Comm'rs v. Brown*, 1 Ohio N.P. (n.s.) 357, 358 (C.P. Lawrence County 1903) (public money is provided to county agricultural societies "to promote and encourage the development of the agricultural resources of the state"); 1985 Op. Att'y Gen. No. 85-061; *see also State ex rel Leaverton v. Kerns*, 104 Ohio St. 550, 554-55, 136 N.E. 217, 218 (1922) ("an agricultural fair is ... a public institution designed for public instruction, the advancement of learning and the dissemination of useful knowledge"). In operating the county fair, the county agricultural society is eligible to receive public money and is subject to statutory requirements and to regulation by the Department of Agriculture. *See* R.C. 901.06; R.C. 1711.01, .03-.05, .08-.11, .13-.23, .28-.31; R.C. 3769.082, .087; 3 Ohio Admin. Code Chapters 901-5 and 901-13; 1988 Op. Att'y Gen. No. 88-026. County agricultural societies have been found to be public entities for some

This opinion does not address the reasonableness or wisdom of particular contractual provisions. The language you have proposed, however, does present several issues of concern. With respect to notice, the proposed language indicates that the Fair Association (county agricultural society) may act "at any time, without notice," to enter into exclusive arrangements and the exhibitor/vendor agrees to "fully comply" with the arrangements. An exhibitor or vendor may thereby be obligated to purchase products from suppliers who are not known when the exhibitor or vendor enters into its contract. It must be presumed that notice will be provided before compliance with the arrangement will be required. It might be appropriate to consider providing a means by which the exhibitor or vendor may escape from the contract if the supplier does not meet its

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purposes. *See* R.C. 1711.13 (county agricultural society is a body "corporate and politic"); 1992 Op. Att'y Gen. No. 92-078 (board of directors of county agricultural society is a public body for purposes of the open meeting provisions of R.C. 121.22); 1988 Op. Att'y Gen. No. 88-034 (county agricultural society is a political subdivision for purposes of tort liability under R.C. Chapter 2744); 1984 Op. Att'y Gen. No. 84-035 (county agricultural society is a public authority subject to prevailing wage laws to the extent that it spends public funds for public improvements). *But see* 1965 Op. Att'y Gen. No. 65-163 (county agricultural society is not a local authority for purposes of the Uniform Depository Act).

It might be argued that, since the operation and promotion of county fairs is a state purpose, a county agricultural society is not subject to statutory restraint-of-trade provisions when it takes action that is reasonably required for the operation of the county fair, such as entering into contracts for exclusive suppliers of products for the fair. It is not clear whether this argument would prevail. *See, e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *see also, e.g., FTC v. Hospital Bd. of Directors*, 38 F.3d 1184 (11th Cir. 1994); *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260 (3d Cir. 1994).

requirements or charges more than it can afford, or if conflicts arise regarding prior contractual obligations. It might be appropriate also to consider the extent to which the uniformity of supplies may negatively affect the character of the fair and the variety of products offered by the exhibitors and vendors. These and other practical questions should be considered, along with the restraint-of-trade issues, in determining whether to include a contractual provision of the type you have described.

In conclusion, it is my opinion, and you are advised, that statutory restraint-of-trade provisions do not as a matter of law prevent a county agricultural society from requiring that exhibitors and vendors purchase foodstuffs or other products for use or sale at the county fair from vendors who are designated as exclusive suppliers. The validity of particular contracts must be determined on a case-by-case basis.

Respectfully,

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Attorney General

June 14, 1996

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SYLLABUS: 96-037

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