U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch

Corner Mart,

Appellant,

v.

Case Number: C0207213

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture, Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that Corner Mart (hereinafter "Appellant") was properly denied authorization to participate in the Supplemental Nutrition Assistance Program (SNAP) by the Retailer Operations Division, Retailer Operations Branch, hereinafter "ROD Office."

ISSUE

The issue accepted for review is whether the ROD Office took appropriate action, consistent with 7 C.F.R. § 271.2, § 278.1(b)(1), (6) and § 278.1(k)(2) when it made the decision to deny the application by Appellant for authorization to participate in the SNAP.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations at 7 C.F.R. § 279.1 provide that "A food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may file a written request for review of the administrative action with FNS."

CASE CHRONOLOGY

The record reflects that on 2/14/2018, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) signed as Owner of Corner Mart an application for authorization to participate in the SNAP. A store visit was conducted on February 26, 2018. Appellant was subsequently advised in a letter dated March 5, 2018 of the Department's decision to deny the application. The regulatory bases given for that

denial were 7 C.F.R. § 278.1(b)(1), (6) and § 278.1(k)(2). On March 7, 2018, Appellant requested an administrative review of this action. The request was granted.

STANDARD OF REVIEW

In appeals of adverse actions an appellant bears the burden of proving by a preponderance of the evidence that the administrative actions should be reversed. That means an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW

The controlling statute in this matter is contained in the **Food & Nutrition Act of 2008**, as amended, at 7 U.S.C. § 2018 and in Part 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2018, 7 C.F.R. § 271.2, § 278.1(b)(1), (6) and § 278.1(k)(2) establish the authority upon which a retail food store or wholesale food concern may be denied authorization to participate in the SNAP. There also exist FNS policy memoranda and clarification letters which further explain the conditions necessary for stores to qualify for participation in the SNAP.

7 C.F.R. § 271.2 states, in part:

> **Retail Food Store** means: An establishment or house-to-house trade route that sells food for home preparation and consumption normally displayed in a public area, and either offers for sale qualifying staple food items on a continuous basis, evidenced by having no fewer than three different varieties of food items in each of four staple food categories with a minimum depth of stock of three stocking units for each qualifying staple variety, including at least one variety of perishable foods in at least two such categories, (Criterion A)…or has more than 50 percent of its total gross retail sales in staple foods (Criterion B)…Entities that have more than 50 percent of their total gross sales in: food cooked or heated on-site by the retailer before or after purchase; and hot and/or cold prepared foods that are consumed on the premises or sold for carry-out, are not eligible for SNAP participation as retail food stores…
>
> And
>
> Accessory food items include foods that are generally considered snack foods or desserts such as, but not limited to, chips, ice cream, crackers, cupcakes, cookies, popcorn, pastries, and candy, and other foods that complement or supplement meals, such as, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, condiments, spices, salt and sugar. Accessory food items shall not be considered staple foods for the purposes of determining the eligibility of any firm.

7 C.F.R. § 278.1(a) states:

> FNS shall approve or deny the application within 45 days of receipt of a completed application. A completed application means that all information (other than an on-site visit) that FNS deems necessary in order to make a determination on the firm's application has been received.

7 C.F.R. § 278.1(b)(1)(ii) further stipulates, in part:

> Application of Criterion A. In order to qualify under this criterion, firms shall: Offer for sale and normally display in a public area, qualifying staple food items on a continuous basis, evidenced by having, on any given day of operation, no fewer than three different varieties of food items in each of the four staple food categories with a depth of stock of three stocking units for each qualifying staple variety and at least one variety of perishable foods in at least two staple food categories.

7 C.F.R. § 278.1(b)(1)(iii) states, in part:

> Application of Criterion B: In order to qualify under this criterion, firms must have more than 50 percent of their total gross retail sales in staple food sales. Total gross retail sales must include all retail sales of a firm, including food and non-food merchandise, as well as services, such as rental fees, professional fees and entertainment/sports/games income.

7 C.F.R. § 278.1(b)(1)(ii)(C) states, in part:

> …Variety of foods is not to be interpreted as different brands, nutrient values, flavorings, packaging types or styles or package sizes of the same or similar foods.
>
> …Accessory foods shall not be counted as staple foods for the purposes of determining eligibility to participate in the SNAP as a retail food store.

7 C.F.R. § 278.1(b)(1)(iv) states, in part, ineligible firms under this paragraph include:

> …specialty doughnut shops or bakeries not selling bread.
>
> …firms that are considered to be restaurants, that is, firms that have more than 50 percent of their total gross sales in foods cooked or heated on-site by the retailer before or after purchase; and hot and/or cold prepared foods not intended for home preparation or consumption, including prepared foods that consumer on the premises or sold for carryout, shall not qualify for participation as retail food stores under Criterion A or B.

7 C.F.R. § 278.1(b)(6) states, in part,

> FNS will consider whether the applicant firm is located in an area with significantly limited access to food when the applicant firm fails to meet Criterion A or B, so long as the applicant firm meets all other SNAP authorization requirements.

7 C.F.R. § 278.1(k)(1) and (2) state, in part:

> FNS shall deny the application of any firm if it determines that:
> The firm does not qualify for participation in the program as specified in paragraph (b), (c), (d), (e), (f), (g), (h) or (i) of this section; or The firm has failed to meet the eligibility requirements…under Criterion A or Criterion B….Any firm that has been denied authorization on these bases shall not be eligible to submit a new application for authorization in the program for a minimum period of six months from the effective date of the denial.

APPELLANT'S CONTENTIONS

In its written request for review dated March 7, 2018, Appellant provided information in which it was argued that:

1. Regarding Criterion A: Appellant opened for business on January 23, 2018 and applied for a commercial building permit on January 24, 2018; the permit was not obtained until February 28, 2018. During this period Appellant could not purchase certain inventory items. The store visit was conducted on February 26, 2018, also during this period. Appellant provides a copy of a receipt for business license fees paid, a copy of the firm's Suffolk Business License issued on February 28, 2018 and a copy of the firm's Commercial Building Clearance Application signed January 23, 2018.
2. Appellant has added inventory and now qualifies under Criterion A and/or B.
3. Regarding Criterion B: the information provided on the application was only an estimate. However, since obtaining the business license referenced above, Appellant notes that 90% of the customers use SNAP benefits to buy daily groceries, which would put the firm's annual staple food sales over 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per year.

ANALYSIS AND FINDINGS

The record reflects that a contracted store visit to Appellant's firm was conducted on February 26, 2018. Documentation generated as a result of that visit includes photographs of the firm's interior and exterior, a store layout diagram and a store inventory survey reflecting that the firm had ample varieties of staple food stock in the fruits and vegetables category but had an inadequate stock of staple food in the dairy category, in the breads and cereals category and in the meats/poultry/fish category, thus failing to qualify under Criterion A. Appellant's application to participate in the SNAP indicated that the firm's staple food sales did not exceed 50 percent of gross retail sales (Appellant had indicated staple foods comprised 10% of total gross sales). As staple food sales must comprise more than 50 percent of a firm's gross retail sales, the store was ineligible for authorization under Criterion B. It is additionally noted that the Appellant firm maintained a considerable stock of prepared, ready-to-eat foods and accessory food items, which are not considered staple food for the purposes of the SNAP. In addition, the firm maintained a substantial inventory of tobacco and tobacco-related products, pet food, alcohol, health and beauty products, paper goods, automotive supplies and other non-food items.

Moreover, the firm operated as a gas station; thus the store visit further corroborated that staple food sales could not have reasonably exceeded 50% of gross sales.

In regard to contention 1 above, it is acknowledged that extenuating circumstances may have contributed to the level and composition of staple food inventory observed at the firm on the day of the store visit; however, there is no provision in the statute or regulations which allows such considerations to warrant a reversal of a denial decision correctly made. Additionally, as noted above, 7 C.F.R. § 278.1(k)(1) and (2) clearly provides that FNS shall deny the application of any firm if it determines that the firm does not qualify for participation in the program as specified in paragraph (b), (c), (d), (e), (f), (g), (h) or (i) of this section, or the firm has failed to meet the eligibility requirements…under Criterion A and B.

Regarding contention 2 above, it is important to clarify for the record that the purpose of this review is to validate or to invalidate the earlier decision of the SNAP Office and as such it is limited to consideration of the relevant facts and circumstances at the time of the decision. It is not within the scope of this review to consider actions Appellant may take or may have taken to qualify for participation in the SNAP subsequent to that decision. Therefore, Appellants' contention that it has taken measures to qualify under Criterion A or B of the eligibility requirements is not a valid basis upon which to reverse the decision by the SNAP Office.

With regard to contention 3 above, Appellant's application to participate in the SNAP estimated that staple food sales comprised approximately 10% of gross sales. The store visit corroborated that staple food sales would have been a low percentage of gross sales. Appellant notes that it would now estimate staple food sales at 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per year. However, even if that figure were accurate, the firm would not qualify under Criterion B, given Appellant's gross sales estimate.

The authorization of a store to participate in the SNAP must be in accord with the Act and the Regulations, as amended; those requirements of law cannot be waived. The SNAP regulations at §278.1(b)(1)(i) are clear (with emphasis added) that, under Criterion A, a firm shall offer for sale, *on a continuous basis*, a variety of qualifying staple foods in each of the four categories or have more than 50 percent of the total gross retail sales of the establishment in staple foods (Criterion B). The store was deficient in three of the four staple food categories on the day of the visit, and, therefore, did not offer qualifying staple foods on a *continuous* basis. Likewise, the firm could not reasonably have qualified under Criterion B. Appellant has provided insufficient information and/or documentation demonstrating that the firm qualified to participate in the SNAP at the time of the store visit and the resulting decision to deny the firm's application.

Lastly, the ROD Office correctly concluded that the firm was not located in a Low Food Access area and therefore did not qualify for eligibility under 7 C.F.R. § 278.1(b)(6).

CONCLUSION

In view of the above, it is my determination that the ROD Office's denial of Appellant's application for authorization to participate in the SNAP is in accord with the law and regulatory provisions at 7 U.S.C. § 2018, 7 C.F.R. § 271.2, § 278.1(b)(1), (6) and § 278.1(k). The denial,

therefore, is sustained. However, it is noted that the six-month waiting period following denial stipulated by the **Food and Nutrition Act of 2008** (Sec. 9(d)) and the regulations at § 278.1(k)(2) will elapse on September 5, 2018; accordingly, Appellant may reapply for participation in the SNAP up to 10 days prior to that date.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) days of receipt of this decision.

Under the provisions of the Freedom of Information Act (FOIA), FNS is releasing this information in a redacted format as appropriate and will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

DANIEL S. LAY April 18, 2018
Administrative Review Officer