

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

Faidley’s Seafood,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0223148

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division (Retailer Operations) to withdraw the authorization of Faidley’s Seafood (hereinafter Appellant), to participate as an authorized retail food store in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) Part 278 in its administration of SNAP, when it withdrew the authorization of Appellant to participate as a SNAP retail food store.

AUTHORITY

7 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, provide that a food retailer 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

FNS requires that stores be reauthorized on a set schedule. As part of this process, ownership was requested to complete a reauthorization application. Retailer Operations sent ownership a letter dated June 29, 2019, requesting additional information to ascertain Appellant’s continued eligibility to participate in SNAP. The case record shows that Appellant submitted information to Retailer Operations during the reauthorization process.

By letter dated September 11, 2019, the authorization of Appellant to participate in SNAP was withdrawn because it is primarily a restaurant with more than 50% of total gross retail sales from heated and/or prepared foods. Heated foods are foods cooked or heated by the retailer before or after purchase. Prepared foods are hot or cold foods not intended for home preparation and/or home consumption, including prepared foods that are consumed on the premises or sold for carryout. The letter states the firm is primarily a restaurant based on information provided in Appellant's reauthorization application and/information obtained from a store visit on September 29, 2018. As Appellant failed to meet the eligibility criteria for approval, ownership was informed that it could not submit a new application to participate in SNAP for a period of six months from the effective date of this withdrawal; however, if its business model remains the same, its application may be denied for the same reasons it was withdrawn.

In a letter dated September 16, 2019, Appellant's ownership appealed Retailer Operations' decision and requested an administrative review of this action. The appeal was granted by letter dated October 28, 2019, and implementation of the withdrawal was held in abeyance pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse action, Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1(k)(1) and (l)(1) establish the authority upon which the application of any firm to participate in SNAP may be withdrawn if it fails to meet the definition of an eligible firm.

7 CFR §278.1(n) provides, in part, At the request of FNS a retail food store or wholesale food concern will be required to undergo a periodic reauthorization determination by updating any or all of the information on the firm's application form.

7 CFR § 271.2 provides, in part, Entities that have more than 50% of their total gross retail sales in: Food cooked or heated on-site by the retailer before or after purchase; and hot and/or cold prepared foods not intended for home preparation and consumption, including prepared foods that are consumed on the premises or sold for carry-out are not eligible for SNAP participation as retail food stores. Establishments that include separate businesses that operate under one roof and share the following commonalities: Ownership, sale of similar foods, and shared inventory,

are considered to be a single firm when determining eligibility to participate in SNAP as retail food stores.

7 CFR § 278.1(k)(1) references 7 CFR § 278.1(b)(1)(iv), Ineligible Firms, which provides, in part, Firms that are considered to be restaurants, that is, firms that have more than 50% 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 are consumed on the premises or sold for carryout, shall not qualify for participation as retail food stores under Criterion A or B. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout.

7 CFR § 278.1(l)(1) provides, in part, FNS shall withdraw the authorization of any firm authorized to participate in the program for any of the following reasons: (i) The firm's continued participation in the program will not further the purposes of the program; (ii) The firm fails to meet the specifications of paragraph (b), (c), (d), (e), (f), (g), (h), or (i) of this section; (iii) The firm fails to meet the requirements for eligibility under Criterion A or B, as specified in paragraph (b)(1)(i) of this section; or, for co-located wholesale/retail firms, the firm fails to meet the requirements of paragraph (b)(1)(vi) of this section, for the time period specified in paragraph (k)(2) of this section.

Section 9 of the Food and Nutrition Act of 2008, as amended, provides in part, a retail food store or wholesale food concern that is denied approval to accept and redeem benefits because the store or concern does not meet criteria for approval may not, for at least six months, submit a new application to participate in the program.

Regulatory Change

Due to a change in Federal regulations, foods cooked or heated after sale are now treated the same as prepared hot and cold food not intended for home preparation and consumption in determining whether a store is a restaurant under 7 CFR § 278.1(b)(1)(iv). FNS published a final rule entitled "Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)" at 81 Federal Register 90675 on December 15, 2016. This final rule added the language to existing regulations clarifying that foods heated or cooked after sale would be considered in determining whether a firm is a SNAP ineligible restaurant. This portion of the rule was implemented by FNS on October 16, 2017.

APPELLANT'S CONTENTIONS

The following may represent a summary of Appellant's contentions in this matter; however, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein:

- The Faidley's family have been proud "FISH MONGERS" for 133 years. We have never considered ourselves a restaurant. Although we have evolved as we acquired other stalls, our fish market operation has not changed. It features fresh caught whole fish on ice, a

cleaning station, and a plethora of frozen seafood options intended for home consumption.

- We understand that our business model is unique. We have three separate city permits, one for each operation, with different items sold. The three separate and distinct stalls are Fresh/Frozen Fish Market, Raw Bar, and Cooked Seafood.
- Our fish market entity has its own food permit, separate accounting, separate employees, separate and distinct inventory, and an independent lease.
- Sample register receipts for the fish market show the totals of grocery items for the market. Sales tax is generated by the computer on all hot food items. The only items that require tax are the steam pot or steam items, and hot food constitutes less than 5% of total sales. This qualifies under Criterion B.
- We argue that because we “co-locate”, we do not qualify. According to the USDA RPMD Policy Memorandum dated October 13, 2017, under the clarification paragraph, four elements must be met. Faidley’s only meets two. First, we do operate under one roof with shared expenses and infrastructure. Second, we do share ownership of three separate entities or stalls. The third and fourth elements do not apply. Each entity sells different items. There are very few crossovers in inventory and we do not share inventory. On rare occasion, one entity may need to purchase from another; that’s not sharing, that’s selling.
- We appeal your determination that we no longer qualify to support our community and provide them healthy staple options based on the facts that the market operates separately from our other entities within a grocery store and that all four elements required for colocation do not apply. Failure to recognize that fact does a disservice to the citizens of Baltimore and to our history.

In support of these contentions, Appellant provided the following:

- A typed list of items sold at Faidley’s Fish Market, with a handwritten note at the bottom that reads, “*Note-None of these items are the same as the items in our kitchen.”
- Copies of three register receipts for the fish market dated 9-12-2019, 09-13-2019, and 09-14-2019.
- A typed list of Raw Bar Menu items.
- A copy of a menu for 5 U.S.C. § 552 (b)(6) & (b)(7)(C), with Kitchen handwritten on the top. The bottom provides its website address at www.faidleyscrabcakes.com; hours of operation; prices, subject to change, effective 8/13/19; and promotes its Google+ page and commercial on youtube.
- A copy of an advertisement giving kudos to Faidley’s crabcakes and shipping of its crabcakes.

ANALYSIS AND FINDINGS

The reauthorization process is to ensure that authorized retailers continue to meet the eligibility criteria for SNAP authorization. The purpose of this review is to validate or to invalidate the decision of Retailer Operations. Thus, it is limited to consideration of the relevant facts at the time Retailer Operations rendered its decision. 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.

Appellant contends that the firm is not a restaurant, but a fish market that features fresh caught whole fish on ice, a cleaning station, and a plethora of frozen seafood options intended for home consumption. It further contends it meets the requirements of Criterion B as over half of its sales are from staple foods. For the purpose of determining whether a firm is a restaurant, the issue is not whether the firm has available for sale SNAP-eligible food. The central issue is whether actual sales of prepared foods comprise more than 50% of the store's total gross retail sales. There is no doubt that staple food items may be delivered to the store fresh, raw and unprepared, and are available to customers that way.

The FNS store visit conducted on September 29, 2018, show Appellant is set-up primarily to sell hot and/or cold prepared foods that are consumed on the premises or sold for carryout and require no additional preparation. The case record also shows Retailer Operations conducted a sales evaluation of the sales records provided by Appellant and found that its hot and/or cold prepared food sales were 56% of its total retail sales. In addition, all firm sales are reported to the State under one corporation. Therefore, the firm exceeds the restaurant threshold, and is considered a restaurant.

Appellant contends its fish market is colocated, but the three entities/stalls are distinct with three separate city permits for each operation and different items being sold. Its fish market has its own food permit, separate accounting, separate employees, separate and distinct inventory, and an independent lease. Appellant references USDA RPMD Policy Memo dated October 13, 2017, which sets forth the four elements used to determine whether a retail store co-located with a restaurant is considered a single firm and contends it only meets two of the four elements. It contends it operates under one roof and shares ownership; however, it does not sell similar food or share inventory.

The case record shows Appellant provided no food permits for evaluation; however, the food permit alone cannot establish a firm as a separate entity. Regarding RPMD Implementation Memorandum 2018-01, Retailer Operations found the firm's Federal business tax filing, sales and use filing, business licenses, and lease indicate that the firm operates under a shared ownership, Faidley's Seafood, owned and operated by the same owner, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The store visit report and photos, the firm's online presence, and information provided by Appellant indicate there is no formal documentation of separate management or formal documentation to show that employees are employed by the various parts of the business.

The case record also shows Retailer Operations reviewed the menu board picture and invoices/receipts provided by Appellant and found similar food items in all three entities of the owners' business. The store visit photos also show that Appellant uses the same storage for all three parts of the business. While Appellant stated much of the inventory is not shared among the three entities, some inventory is shared. Appellant admits that there is some crossover in inventory and when an item is needed from one entity to another, it is sold, not shared. This further proves that similar food is shared among the three entities. No sales transaction evidence

showing the sale of inventory from one entity to the other was provided. The invoices provided do not prove that the three entities are separate businesses. There are no distinctions on the invoices showing they are for three different entities which coincide with the business licenses, stall numbers, or distinct account numbers. Therefore, the fish market, restaurant, and raw bar are considered to be one firm.

Appellant contends that it supports its community by providing healthy staple options and failure to recognize that fact does a disservice to the citizens of Baltimore and to its history. Some degree of inconvenience to SNAP benefit users is inherent in the disqualification from SNAP of any participating food store, since the normal shopping pattern of such SNAP participants may be changed due to the disqualification. SNAP regulations at § 278.6(f)(1) provides for Civil Money Penalty (CMP) assessments in lieu of disqualification in cases where disqualification would cause “hardship” to SNAP households because of the unavailability of a comparable participating retail food store in the area to meet their needs. Since Appellant is not an eligible retailer, this CMP provision is not applicable.

CONCLUSION

Based upon a review of all of the evidence in this matter, the decision by Retailer Operations to withdraw the authorization of Appellant because the firm does not meet the requirements of a retail food store as set forth in § 278.1(b)(1) of the SNAP regulations is sustained. The eligibility requirements to participate as a SNAP retail food store must be met and cannot be waived.

In accordance with the Food and Nutrition Act of 2008, as amended, and its associated regulations, this withdrawal action shall become effective 30 days after delivery of this letter. Appellant shall not be eligible to submit a new application to participate in SNAP for a period of six months from the effective date of this withdrawal. However, if Appellant’s business model remains the same, its application may be denied for the same reasons it was withdrawn.

General questions regarding the application process can be handled by contacting 877-823-4369 and by consulting the USDA website. Operational questions regarding the withdrawal should be directed to the office that initially took the action to withdraw Appellant; please contact Jemall Pittman at jemall.pittman@usda.gov or (410) 842-0221 with questions about operations.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this Decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. 2023) and to SNAP regulations at 7 CFR § 279.7. If a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which Appellant’s owners reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within 30 days of receipt of this Decision. Please note that the judicial filing timeframe is specified in the Act, and this office is unable to grant an extension.

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

KIM DAMERON
Administrative Review Officer

June 17, 2020