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

Sea Farm, **Appellant,** **v.** **Retailer Operations Division,** **Respondent.**	**Case Number: C0226060**

FINAL AGENCY DECISION

The USDA, Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the decision of the Retailer Operations Division to withdraw the authorization of Sea Farm to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the Appellant may not reapply to participate in the SNAP for a period of six (6) months after the effective date of the withdrawal.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278 in its administration of the SNAP, when it withdrew the authorization of Sea Farm.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 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

In a letter dated January 13, 2020, the Retailer Operations Division informed the Appellant that it was being withdrawn from the SNAP as it no longer met the definition of a retail food store under 7 CFR § 271.2 and 7 CFR § 278.1(b)(1) of the SNAP regulations. Specifically, the letter stated that the Appellant was primarily a restaurant as the evidence indicated that more than 50 percent of its gross retail sales are in heated, hot or cold prepared food not intended for home preparation and consumption. The letter also informed the Appellant that it could not submit a new application to participate in SNAP for a period of six (6) months from the effective date of the withdrawal as provided by SNAP regulations at 7 CFR § 278.1(k)(2).

In a letter postmarked January 21, 2020, the Appellant requested an administrative review of the Retailer Operation Division's decision to withdraw the firm's SNAP authorization. The request for review was granted and implementation of the withdrawal was held in abeyance pending completion of this review.

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 AND REGULATIONS

The controlling law in this matter is covered in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2018, and SNAP regulations at Title 7 Code of Federal Regulations (CFR) Parts 271 and 278. In particular, SNAP regulations at 7 CFR § 278.1(l) establishes the authority upon which FNS may withdraw an application from a retail food store or wholesale food concern.

7 CFR 278.1(n) states, in part ….

> **Periodic reauthorization.** 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 § 278.1(l) states in part, that:

> (1) 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) ….

7 CFR § 278.1(b)(1)(iv) states, in part:

> Ineligible firms. Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of SNAP shall not be eligible for program participation … 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 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 …. [Emphasis added.]

7 CFR § 271.2, defines a retail food store, in part, as:

> 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 seven different varieties of food items in each of the 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 three such categories, (Criterion A) as set forth in § 278.1(b)(1) of this chapter, or has more than 50 percent of its total gross retail sales in staple foods (Criterion B) as set forth in § 278.1(b)(1) of this chapter as determined by visual inspection, marketing structure, business licenses, accessibility of food items offered for sale, purchase and sales records, counting of stockkeeping units, or other accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter. Entities that have **more than 50 percent 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 under § 278.1(b)(1) of this chapter. **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**. [Emphasis added.]

7 CFR § 278.1(k)(2) reads, in relevant part:

> ... 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.

Regulatory Change

Due to a recent 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). On December 15, 2016, FNS published a final rule entitled "Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)" at 81 Federal Register 90675. 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 Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- The business is not a restaurant and has never been one.
- The owner made an honest mistake by confusing the reported hot and cold prepared food sections of the application.
- The majority of the firm sales come from fish/shell fish that is cleaned and prepared for the customer.
- The firm does have a carryout area with fried fish/chicken/fries but these are secondary items in the firm's sales.

The preceding may represent only a brief summary of the 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.

ANALYSIS AND FINDINGS

The central issue is this case is whether Sea Farm is a SNAP ineligible restaurant **as that term is defined under 7 CFR § 278.1(b)(1)(iv)**. In reaching its decision to withdraw the firm's application, the Retailer Operations Division reviewed the reauthorization application and the store visit report. A review of the entire case record indicates by a preponderance of the evidence that the Retailer Operations Division properly determined that Sea Farm does not qualify for the SNAP as it is primarily a carryout restaurant.

Reauthorization Process

As part of a routine reauthorization process, the Appellant submitted a reauthorization form FNS-252-R, entitled "Supplemental Nutrition Assistance Program Reauthorization Application for Stores" dated November 22, 2019. The Appellant's reauthorization application stated that 30 percent of its tax year 2018 actual gross retail sales were in staple foods. The Appellant reported that SNAP ineligible hot, heated, and/or cold prepared food accounted for 60 percent of its gross retail sales. The remaining ten (10) percent was in accessory food sales.

Accessory food items may be purchased with SNAP benefits but are **not** used in determining SNAP eligibility. Accessory food items include foods that are generally considered snack foods or desserts and other food items that complement or supplement meals, such as, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, condiments, spices, salt, and sugar.

Thus, on the face of the reauthorization application, the Appellant firm appeared to be an ineligible restaurant as defined at 7 CFR § 278.1(b)(1)(iv) which states, in part:

> … 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 are consumed on the premises or sold for carryout, shall not qualify for participation as retail food stores ….

Store Visit Report

On January 3, 2020, an FNS contractor conducted a store visit to assess the firm's continued eligibility for the SNAP. The store visit report and photographs documents that the interior footprint of Sea Farm is largely devoted to the preparation and sale of SNAP ineligible heated, hot and cold prepared food not intended for home preparation and consumption. Approximately 50-60 percent of the store's footprint is located behind the customer checkout area and is inaccessible to customers. This area contains a large commercial kitchen with food preparation equipment (including fryers) and large food storage areas.

The entry area contained eleven (11) seats where customers could wait on their prepared food orders. Above and behind the checkout area there was a large menu board advertising hot and cold prepared food including fish sandwiches, crab cakes, chicken wings, various fish/chicken/shrimp/crab combo meals, cheese steak sandwiches, ribeye steak, seafood salad, crab sticks, 12 piece shrimp, and clam strips. The menu board also advertised side orders including onion rings, French fries, hush puppies and corn dogs. Numerous Styrofoam containers for takeout of prepared food was available behind the checkout counter. Signs posted at the checkout noted that the Richmond city tax for hot food was 12.8 percent and the tax for cold food was 2.5 percent. Lastly, there was a tip jar located at the checkout area which is consistent with a store that sells prepared food items.

Concerning the firm's accessory food sales, there was a shelf containing a limited amount of inexpensive seasonings which would be considered as an accessory food item along with the carbonated and non-carbonated drinks available for purchase from a standing cooler.

Concerning the firm's staple food sales, there was a relatively small display area with a limited amount of fresh seafood for sale which was visible upon entering the store. This would normally be considered staple food, but if heated before or after sale would be considered SNAP ineligible prepared food. In addition, the fresh seafood in view of the customers did not appear to be available in quantities sufficient to support that the firm had a larger percentage of staple food sales than what was originally reported by the Appellant.

In conclusion, there is nothing in the store visit report that supports that the sales percentages reported by the Appellant in its November 22, 2019 reauthorization application are inaccurate. It fact, the observable store inventory and characteristics, more likely than not, support the original sales percentages reported by Sea Farm.

Supporting Sales Documents

The Appellant store owner states that the sales percentages reported in the firm's reauthorization application were due to an honest mistake. However, there is nothing in the case record to support that the sales percentages originally reported by the Appellant are inaccurate.

The Appellant did not provide any sales documents to support its contention that staple food sales make up a majority of the firm's gross retail sales. The store visit report documented that the store had two (2) cash registers and both accepted SNAP purchases. It is therefore likely that

the Appellant does not have the appropriate documentation to distinguish between staple food sales, accessory food sales and heated/hot/cold prepared food sales.

Summary

A preponderance of the evidence supports the Retailer Operation Division's determination that the Appellant firm likely has more than 50 percent of its total gross retail sales in heated, hot and cold prepared food as reported by the Appellant on its FNS-252-R. The SNAP regulations at 7 CFR § 278.1(b)(1)(iv) states, that "firms that have more than 50 percent of their total gross retail sales in heated, hot and/or cold prepared foods not intended for home preparation and consumption, shall not qualify for participation as retail food stores." By definition these types of firms are considered restaurants and are ineligible for SNAP authorization.

CONCLUSION

Based on the analysis above, the decision by the Retailer Operations Division to withdraw the SNAP application of the Appellant, Sea Farm, is **sustained**. In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to submit a new application for SNAP authorization for six (6) months from the effective date of the withdrawal. However, please note that if the business model remains the same and you reapply, your application may be denied for the same reasons it was withdrawn this time.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses your right to a judicial review of this determination. Please note that 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 you 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 thirty (30) days of receipt of this Decision. Please note that the judicial filing timeframe is specified in the Act, and this office cannot grant an extension.

Under the Freedom of Information Act, FNS is 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.

RONALD C. GWINN May 4, 2020
Administrative Review Officer