



# STATE OF INDIANA

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October 21, 2013

Mr. Warren Auxier  
P.O. Box 215  
Hanover, IN 47243

*Re: Informal Inquiry 13-INF-54: Jeffersonville Urban Enterprise Zone*

Dear Mr. Auxier:

This is in response to your informal inquiry regarding the status as a public agency of the Jeffersonville Urban Enterprise Zone Association ("JUEZA"). Your inquiry suggests that, contrary to previously published Advisory Opinion 13-FC-231, the JUEZA is a public agency as defined in the Access to Public Records Act. ("APRA") Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion in response to your inquiry. My opinion is based on applicable provisions of the APRA, Ind. Code § 5-14-3-1 *et seq.*

## BACKGROUND

On September 18, 2013, you submitted a request for an informal inquiry specifically questioning the status of the Jeffersonville Urban Enterprise Zone Association as a public agency. Former Counselor Hoage addressed this very issue in 13-FC-321 as an Advisory Opinion. I have reviewed that particular file and the Advisory Opinion and you have submitted considerably more information than was at the disposal of Counselor Hoage at the time of his determination. Specifically, you have provided the JUEZA's strategic plan, the resolution of the City Council establishing the JUEZA, and several applicable statutes.

The JUEZA was established by resolution in 1999 by the City of Jeffersonville Town Council. It was incorporated as a non-profit domestic corporation in 2000. Its purpose was to execute the provisions under Ind. Code § 5-28-15 *et al.* When Counselor Hoage found JUEZA was not a public agency, he opined their status as a non-profit organization did not meet the threshold of the definition of a public agency or governing body under the APRA. The complainant did not meet his burden of demonstrating that the JUEZA had exercised powers and duties consistent with a public agency. The portion of his opinion speaking to the non-profit is incorporated by reference.

Additionally, you submitted information alleging the members of the JUEZA take an oath before becoming members of the board and also the 2011 Federal Form 990 wherein the JUEZA identified themselves as a government unit.

Ind. Code § 5-14-3-2(n)(1).

## ANALYSIS

The Open Door Law (“ODL”) (Ind. Code § 5-14-1.5-1) states that [it] is the intent of [ODL] that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. Ind. Code § 5-14-28-15 (emphasis added) sets forth the powers and duties of an urban enterprise association:

- (a) A U.E.A. **shall** do the following:
  - (1) Coordinate zone development activities.
  - (2) Serve as a catalyst for zone development.
  - (3) Promote the zone to outside groups and individuals.
  - (4) Establish a formal line of communication with residents and Businesses in the zone.
  - (5) Act as a liaison between residents, businesses, the municipality, and the board for any development activity that may affect the zone or zone residents.
- (b) A U.E.A. **may** do the following:
  - (1) Initiate and coordinate any community development activities that aid in the employment of zone residents, improve the physical environment, or encourage the turnover or retention of capital in the zone. These additional activities include but are not limited to recommending to the municipality the manner and purpose of expenditure of funds generated under IC 36-7-14-39(g) or IC 36-7-15.1-26(g).
  - (2) Recommend that the board modify a zone boundary or disqualify a zone business from eligibility for one (1) or more benefits or incentives available to zone businesses.
  - (3) Incorporate as a nonprofit corporation. Such a corporation may continue after the expiration of the zone in accordance with the general principles established by this chapter. A U.E.A. that incorporates as a nonprofit corporation under this subdivision may purchase or receive real property from a redevelopment commission under IC 36-7-14-22.2 or IC 36-7-15.1-15.2.
- (c) The U.E.A. may request, by majority vote, that the legislative body of the municipality in which the zone is located modify or waive any municipal ordinance or regulation that is in effect in the zone. The legislative body may, by ordinance, waive or modify the

operation of the ordinance or regulation, if the ordinance or regulation does not affect health (including environmental health), safety, civil rights, or employment rights.

(d) The U.E.A. may request, by majority vote, that the board waive or modify any state rule that is in effect in the zone. The board shall review the request and may approve, modify, or reject the request. Approval or modification by the board shall take place after review by the appropriate state agency. A modification may include but is not limited to establishing different compliance or reporting requirements, timetables, or exemptions in the zone for a business or an individual, to the extent that the modification does not adversely affect health (including environment health), safety, employment rights, or civil rights. An approval or a modification of a state rule by the board takes effect upon the approval of the governor. In no case are the provisions of IC 22-2-2 and IC 22-7-1-2 mitigated by this chapter.

The provision of the powers and duties of an Urban Enterprise Zone which mandates their responsibilities are clearly promotional in nature. Nothing in Section (a) suggests any official action. The meaning of official action under the APRA is to receive information; deliberate; make recommendations; establish policy; make decisions; or take final action. "Public business" means any function upon which the public agency is empowered or authorized to take official action. See Ind. Code § 5-14-1.5-2(d) and (e). Furthermore A governing body under the Open Door Law, Ind. Code § 5-14-1.5-2(b) means two (2) or more individuals who are: (1) A public agency that: (A) is a board, a commission, an authority, a council, a committee, a body, or other entity; and (B) takes official action on public business.

Section (b), (c) and (d) of the Urban Enterprise Zone of Title 28 are basically lobbying functions; however, subsection (b) does include the specific power to make recommendations; therefore, it would be considered official action. The recommendations would be public business because the governmental board charged with taking official action created the board. This would trigger their inclusion into the public agency definition *if exercised*. Indiana Courts have long defined the meaning of the word *may* as permissive and shall as mandatory. (See *People's Nat'l Bank v. Ayer*, 24 Ind. App. 212 1900). The statutory construction indicates the legislature's intent to distinguish between the two provisions.

As to the relevant portion of the APRA, it defines a public agency as:

Any board, commission, department, division, bureau, committee, agency, office, instrumentality, or authority, by whatever name designated, exercising any part of the executive, administrative, judicial, or legislative power of the state.

(2) Any:

(A) county, township, school corporation, city, or town, or any board, commission, department, division, bureau, committee, office, instrumentality, or

authority of any county, township, school corporation, city, or town;  
(B) political subdivision (as defined by IC 36-1-2-13); or  
(C) other entity, or any office thereof, by whatever name designated,  
exercising in a limited geographical area the executive, administrative, judicial, or  
legislative power of the state or a delegated local governmental power.

(3) Any entity or office that is subject to:

(A) budget review by either the department of local government finance or  
the governing body of a county, city, town, township, or school corporation; or

(B) an audit by the state board of accounts that is required by statute, rule,  
or regulation.

or

(5) Any advisory commission, committee, or body created by statute, ordinance,  
or executive order to advise the governing body of a public agency

Ind. Code § 5-14-3-2(n)(1)

It is unclear from your inquiry if the JUEZA actually exercises the statutory entitlement to make recommendations to the board or to advise them. If their functions are purely promotional and education in nature, or if they only liaise with other private businesses, then I do not believe the Open Door Law or the APRA is intended to apply. Their independent website does not list recommendations to a governmental agency in their mission.

The JUEZA strategic plan you submitted with your complaint was written in 1999 and would only run through 2002. There exists the likelihood their charter or strategic plan has changed in the proceeding decade. Moreover, the provision in the plan you cited would not be considered as exercising any legislative power of the state. The Powers and Functions clause in the plan only speaks to executing their legislative *requirements* and not enacting new rules or ordinances. It could be argued the enforcement of “zone rules” could be considered an executive or administrative function of the state; however, it is not clear if this is actually being done. It seems unlikely due to the fact the Urban Enterprise Zone statute does not authorize any enforcement capabilities.

Finally, you argue the JUEZA is a public agency because they submitted a Federal Form 990 in 2011 indicating they were a “governmental unit” defined by 26 U.S.C. 170(b)(1)(A)(v) (directed to (c)(1)). This meaning alone is not indicative of falling under the authority of the ODL or APRA. It is clear they were established by the City of Jeffersonville as a 501(c)(3) non-profit organization, but may not be a “governing body” as intended by the APRA and ODL.

I cannot state with absolute authority the JUEZA is a public agency or a governing body. If they exercise a portion of the City’s powers and duties under their designation as a delegation, then they would be subject to the ODL and APRA. If not, the analysis in 13-FC-231 would hold true.

Please let me know if I may be of further assistance.

Best regards,

A handwritten signature in black ink, appearing to read 'LH Britt', with a long, sweeping underline.

Luke H. Britt  
Public Access Counselor