

# SCR130/SR92

Measure Title: URGING THE DEPARTMENT OF LAND AND NATURAL RESOURCES AND THE SAND ISLAND BUSINESS ASSOCIATION TO NEGOTIATE AN EVEN, FAIR, AND EQUITABLE EXCHANGE OF SAND ISLAND INDUSTRIAL PARK LAND THAT WOULD ALLOW SAND ISLAND BUSINESSES TO REMAIN ON THEIR LEASED PARCELS.

Report Title: Sand Island Industrial Park; Land Exchange

Description:

Companion:

Package: None

Current Referral: WTL/EGH, WAM

Introducer(s): SOLOMON, GALUTERIA

<u>Sort by Date</u>		<b>Status Text</b>
3/13/2013	S	Offered.
3/19/2013	S	Referred to WTL/EGH, WAM.
3/21/2013	S	The committee(s) on WTL/EGH has scheduled a public hearing on 03-27-13 10:45AM in conference room 225.

NEIL ABERCROMBIE  
GOVERNOR OF HAWAII



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

Testimony of  
WILLIAM J. AILA, JR  
Chairperson

Before the Senate Committees on  
WATER AND LAND  
and  
ECONOMIC DEVELOPMENT, GOVERNMENT OPERATIONS AND HOUSING

Wednesday, March 27, 2013  
10:45 AM  
State Capitol, Conference Room 225

In consideration of  
SENATE CONCURRENT RESOLUTION 130 / SENATE RESOLUTION 92  
URGING THE DEPARTMENT OF LAND AND NATURAL RESOURCES AND THE  
SAND ISLAND BUSINESS ASSOCIATION TO NEGOTIATE AN EVEN, FAIR, AND  
EQUITABLE EXCHANGE OF SAND ISLAND INDUSTRIAL PARK LAND THAT  
WOULD ALLOW SAND ISLAND BUSINESSES TO REMAIN ON THEIR LEASED  
PARCELS

Senate Concurrent Resolution 130/Senate Resolution 92 urges the Department of Land and Natural Resources (Department) and the Sand Island Business Association (SIBA) to negotiate an even, fair and equitable exchange of the State's Sand Island Industrial Park property for other private properties, to be completed before June 30, 2014. **The Department vigorously opposes these resolutions.**

The Sand Island Industrial Park consists of 113 subdivided lots served by roadways and other infrastructure, and covers approximately 69.119 acres of State lands. SIBA is the State's master lessee. It manages the property, collects rents from the sublessees, and pays ground rent to the Department. Act 235, Session Laws of Hawaii 2011, authorized the Department to consider a sale or exchange of the industrial park to "leaseholders". Act 235 allows the Department and Board to consider various factors (in addition to pure land value) when reviewing a proposed exchange such as, among other factors, the remaining term of the master lease, the current and future revenues to the Department from the master lease, and income stream from the parcel proposed for exchange.<sup>1</sup> Pursuant to Act 235, the Department contracted for an independent

<sup>1</sup> The master lease provided SIBA with a significant lease rental discount during the first twenty-five (25) years of the lease, with the lease rents reverting to market value during the last thirty (30) years. During

WILLIAM J. AILA, JR.  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

ESTHER KIA'AINA  
FIRST DEPUTY

WILLIAM M. TAM  
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES  
BOATING AND OCEAN RECREATION  
BUREAU OF CONVEYANCES  
COMMISSION ON WATER RESOURCE MANAGEMENT  
CONSERVATION AND COASTAL LANDS  
CONSERVATION AND RESOURCES ENFORCEMENT  
ENGINEERING  
FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

appraisal of the fair market value of the industrial park. In a Summary Appraisal Report dated May 10, 2012, the appraisal firm of Hastings, Conboy, Braig & Associates determined that the unencumbered fee simple interest in the land underlying the 113 individual lots within the industrial park was valued at \$175,670,000 as of May 7, 2012.

The industrial park is of immense importance for sustaining the ongoing operations of the Department. The Board of Land and Natural Resources (Board) previously determined that the Department should utilize a portion of the lands it manages, including the industrial park, to generate revenues to carry out its fiduciary duties and support the Department's operations and management of public lands and programs. This is especially critical at this time due to the State's struggling economy. The lease revenues generated by the industrial park constitute about 50% of all lease revenues currently supporting the Department's Special Land Development Fund.

To date, SIBA has identified no private properties to be considered for exchange. Nevertheless, on January 25, 2013, Item D-11, an informational briefing was held for the Board on the results of the appraisal and SIBA's request for a land exchange. The Department advised the Board that it does not recommend an exchange unless the value of the exchange property substantially exceeds the value of, and revenues from, the industrial park,<sup>2</sup> so that the Board is compensated for the loss of its single most important revenue asset and the imposition of greater financial risks. A straight exchange (value for value) would not serve a public purpose or be in the best interest of the State. If the Board were inclined to pursue the exchange, the Department's recommendation was that the State receive the land value of the industrial park, plus a significant incentive premium for the Board, and an income stream with a present value that is equal to or greater than the present value of the income stream under the remaining term of the SIBA lease. Otherwise, there would be no good reason for the Board to consider the sale or exchange of this valuable asset.

Several divisions within the Department submitted testimony in at the January 25, 2013 Board meeting in opposition to the concept of an exchange. The divisions recognized the importance of the industrial park revenues to the operations of the Department for such things as the dam safety program, the geothermal program, the protection of threatened and endangered species, eradication and control of invasive species, and fighting wildland fires. Copies of these testimonies are attached.

SIBA has received the benefit of a significant subsidy from the State over the years in terms of discounted lease rents that exceed the value of the improvements SIBA financed to the property. To the extent the State is forced to exchange these lands on a value for value basis, SIBA and its tenants will receive a windfall at the taxpayers' expense. The Department believes that mandating the exchange of the industrial park to SIBA in return for private lands of merely equal value would not be in the best interest of the Department and akin to a mandate to the Board to

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the last 30 years, for each ten-year reopening period, the first 5-years shall be at fair market rent, then increasing 22.5% during the last 5 years of each remaining 10-year reopening period. This was the deal negotiated with SIBA in order for the Department to recoup the significant discount in rent afforded SIBA during the first twenty-five (25) years of the master lease. To illustrate the amount of the discount, the current annual rent (which was stepped-up from earlier years) is about \$4.8 mil., and current market rent is about \$8.3 mil., which amounts to over \$3.0 mil. below market, annually.

<sup>2</sup> HRS 171-50 is the governing statute on exchanges, and essentially provides that the land to be exchanged for the State land must be of equal value or higher, but not lower.

breach its fiduciary duty by making it more difficult for the Board and Department to fulfill their mission of protecting and preserving the State's natural and cultural resources.



NEEL ABERCROMBIE  
GOVERNOR OF HAWAII



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES

ENGINEERING DIVISION  
POST OFFICE BOX 373  
HONOLULU, HAWAII 96809

January 25, 2013

WILLIAM J. AILA, JR.  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

ESTHER KIA'AINA  
FIRST DEPUTY DIRECTOR

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AQUATIC RESOURCES  
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CONSERVATION AND COASTAL LANDS  
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FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAIHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

Board of Land and Natural Resources  
State of Hawaii  
Honolulu, Hawaii

January 25, 2013 Agenda Item D-11, Regarding the Concept of a Land Exchange  
Between the State of Hawaii and Sand Island Business Association

The Engineering Division is one of several divisions that rely on the Special Land Development Fund (Fund) to support its programs. As such, the Engineering Division has concerns that a possible land exchange involving the Fund's main revenue source will adversely affect the Fund's capability to continue this support.

The Fund is critical for operations of the Engineering Division, as it supports staffing and expenses of multiple statewide programs that are mandated and protect public health and safety. The Fund supports: the Mineral Resources/Geothermal program to manage geothermal resources to protect public health and safety and to ensure its continued viability for future generations; the Flood Control/Dam Safety program to administer the National Flood Insurance Program to ensure the availability of flood insurance to property owners and regulate dams and reservoirs to protect life and property; and the Land Maintenance Crew to manage and maintain various State-owned lands, remove vegetation and debris for streams, and perform evictions on state lease lands. Without the continued support of the Special Land Development Fund, the Engineering Division will not be able to fulfill its mandated duties to protect public health and safety.

Thank you for the opportunity to comment.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Cary S. Chang".

Cary S. Chang  
Chief Engineer



WILLIAM J. AILA, JR.  
CHAIRPERSON  
WILLIAM D. BALFOUR, JR.  
SUMNER ERDMAN  
LORETTA J. RUDDY, A.C.S.W., M.P.H.  
NEAL S. FUJIMURA  
JONATHAN STARR  
TED YAMANURA  
WILLIAM M. TAM  
DEPUTY DIRECTOR

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT  
P.O. BOX 621  
HONOLULU, HAWAII 96809

Board of Land and Natural Resources  
Honolulu, HI  
January 25, 2013

TESTIMONY

Dear Members, Board of Land and Natural Resources:

Re: Concept of Land Exchange between the State of Hawaii and Sand Island business Association ("SIBA") for State-Owned Lands at Sand Island, Honolulu, Oahu, Tax Map Keys: (1) 1-5-41: Various, and Privately-Owned Property Yet to be Identified. Agenda Item D-11

The State Commission on Water Resource Management **strongly opposes the transfer or exchange of State Land at Sand Island, Oahu for any other property.** The Commission joins the DLNR Land Division analysis that an exchange of public lands at Sand Island is both not justified and unwise.

**1. The DLNR Special Land Development Fund Provides Critical Financial Support to the Commission on Water Resource Management.**

The Special Land Development Fund (SLDF) provides critical support for activities and programs essential to the operation of the Commission on Water Resource Management (Commission). SLDF's annual supplemental funding pays for three (3) key Planning Branch positions: the State Drought and Water Conservation Coordinator, Hydrologist VI, and Hydrologist V. These 3 positions comprise the Commission's entire professional (non-supervisory) Planning Branch which is responsible for establishing an integrated program to protect, conserve, and manage the waters of the State. The Commission's General Fund Personal budget is not adequate to pay for these 3 positions. Efforts to convert these Special-Funded personnel to General-Funded have repeatedly failed in the past. Moreover, future pay raises, pay adjustments (e.g., reallocations and step movements), and increases in the fringe benefit rates for these positions will require additional funding.

The SLDF also supplements Commission programs, activities, and priority projects. Many of these activities are conducted on a cost-share basis with the U.S. Army Corps of Engineers and the U.S. Geological Survey (USGS), *effectively doubling the State's funding.* Recent SLDF funded projects include a) Implementation of Interim Instream Flow Standards in East Maui, b) the Annual Cooperative Water Resources Monitoring Program (USGS), and c) the 2011 Rainfall Atlas of Hawaii – historical trends and changes in frequency (USACE). Due to the year-to-year uncertainty of federal grant opportunities, the Commission must maintain available State funding to qualify for federal grants with a cost-share.

Continued SLDF funding is essential for the Commission to implement the State Water Code by funding personnel, program activities, and projects fundamental to water resource planning and fulfilling the State Water Code mandates. The Commission uses its SLDF allotments to effectively manage our most precious public trust resource.

**2. Public Land on Sand Island Situated Diamond Head (East) of the Waste Water Treatment Plant Is Essential for Future Public Facilities (including the City's Planned Expansion to a Secondary Treatment Plant).**

Pursuant to the 2010 Consent Decree between the United States Department of Justice, the U. S. Environmental Protection Agency, the State of Hawaii, the City and County of Honolulu, and Intervenor (*United States v. City and County of Honolulu*, USDC Hawaii, Civ. No. 94-00765 DAE, entered December 17, 2010), the City and County of Honolulu is obligated to design and construct a secondary treatment plant (Consent Decree, Section VII, beginning page 53) Diamond Head (east) of the present Sand Island Waste Water Treatment Plant.

See: <http://www.epa.gov/compliance/resources/decrees/civil/cwa/honolulucwa-cd.pdf>

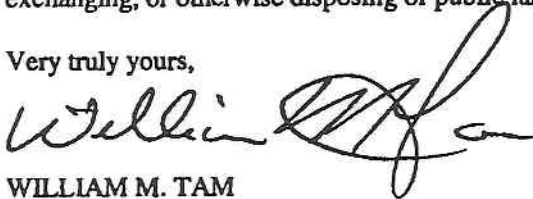
Some of the secondary plant will very likely require portions (or all) of various lots on the Ewa (west) side of the Sand Island Industrial Park (totaling 69 acres) under the 55 year master lease (1992 to 2047) to the Sand Island Business Association ("SIBA"). If title to the land is transferred, the City may be required to turn around and condemn the very same land (at a higher valuation) in order build its secondary plant.

**3. Public Harbor-Related and/or Submerged Lands Should Never Be Sold or Permanently Alienated.**

Public harbor related lands should never be permanently sold or alienated. Public harbor related lands should always be reserved for public facilities in future generations. Harbor lands may be leased to non-public entities from time to time, but title must always remain in the government for future public needs. While public lands in some locations might be replaced or substituted without undue burden on the government's long term functioning or overall public trust responsibilities, harbor lands are different. They are unique and essential to the public good. There are no "substitute" harbor lands. That is why courts carefully scrutinize any proposed transfer of harbor-related or submerged lands – and often strike down the transfer as a violation of the State's Public Trust responsibilities. See *King v. Oahu Railway*, 11 Haw. 717 (1899) (Honolulu Harbor); *In Re Waiahole*, 94 Haw. 97, 9 P.3d 409 (2000); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970); see also, *Haw. Admission Act*, Pub. L. 86-3, 73 Stat 4 (1959), §5(f).

For these reasons, the Board should discontinue any further consideration of selling, transferring, exchanging, or otherwise disposing of public lands at Sand Island, Oahu.

Very truly yours,



WILLIAM M. TAM  
Deputy Director

Fw: D-11 testimony from DOFAW  
Adaline F Cummings to: Russell Y Tsuji, Diane E Hirasuna

01/24/2013 03:37 PM

Adaline Cummings  
Board of Land & Natural Resources  
Secretary  
1151 Punchbowl Street, Suite 130  
Honolulu, Hawaii 96813  
Phone: 808-587-0404  
Fax: 808-587-0390

— Forwarded by Adaline F Cummings/DLNR/StateHiUS on 01/24/2013 03:38 PM —

From: Roger H Imoto/DLNR/StateHiUS  
To: Adaline F Cummings/DLNR/StateHiUS@StateHiUS,  
Cc: Randall W Kennedy/DLNR/StateHiUS@StateHiUS  
Date: 01/24/2013 03:34 PM  
Subject: D-11

Dear Land Board members,

DOFAW wants to go on record opposing the sale of the Sand Island parcels. We understand that this is just a report to the Land Board but we feel the sale would jeopardize this vital long term revenue source which goes to support, via the SLDF, Constitutional and Statutory mandates of DOFAW, in addition to other Divisions in the Department.

For example, this year SLDF has supported the following:

Invasive Species Early Detection and Response	-\$450,000
Endangered Wildlife Recovery	-\$650,000
Rare Plant and Invertebrate Extinction Prevention	-\$350,000
Emergency Response for Hikimoe Fire	-\$500,000
Wildland Fire prevention and Suppression	-\$100,000

Without this much needed support, these conservation and restoration programs and projects would have 'not happened' or be inadequately funded to meet their goals. In addition, we would not have the required match for the Federal dollars.

Again, DOFAW urges the Land Board to oppose any sale so we may continue to have funds to fulfill our mission of 'responsibly manage and protect watersheds, native ecosystems, and cultural resources and provide outdoor recreation and sustainable forest products..'

Mahalo

Roger H. Imoto, DOFAW Acting Administrator

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Roger H. Imoto  
Administrator  
Division of Forestry and Wildlife



Department of Land & Natural Resources  
1151 Punchbowl Street, Rm 325  
Honolulu, Hawaii 96813  
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Fw: D-11  
Russell Y Tsuji to: Diane E Hirasuna

01/24/2013 03:56 PM

Sam J Lemmo

----- Original Message -----

From: Sam J Lemmo  
Sent: 01/23/2013 08:37 AM HST  
To: Adaline Cummings  
Subject: D-11

Dear Land Board members, OCCL wants to go on record opposing the sale of the Sand Island parcels. We understand that this is just a report to the Land Board but we feel the sale should not be given serious consideration. Money that is collected from rents from Sand Island leases supports the functions of OCCL. We are responsible for regulating Conservation District lands including terrestrial and submerged areas. Our mission is to conserve and protect these lands for present and future generations. It is an important function. This kuleana is mandated by the Hawaii State Constitution. What will happen in the future when the cash runs out! It would be a disaster for everyone. Why sell such important revenue lands? It does not make any sense. We urge the Land Board to listen to all sides of the story, but in the end, please do the reasonable/rational thing, which is to oppose any sale so we may continue to fulfill our kuleana for the people of this great state.

Mahalo

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Samuel J. Lemmo, Administrator ><)))))>  
Office of Conservation and Coastal Lands  
Department of Land and Natural Resources  
1151 Punchbowl Street  
Honolulu, Hawaii 96813  
Phn (808) 587-0377  
Fax (808) 587-0322  
[www.hawaii.gov/dlnr/occl](http://www.hawaii.gov/dlnr/occl)



### SCR130/SR92

URGING THE DEPARTMENT OF LAND AND NATURAL RESOURCES AND THE SAND ISLAND BUSINESS ASSOCIATION TO NEGOTIATE AN EVEN, FAIR, AND EQUITABLE EXCHANGE OF SAND ISLAND INDUSTRIAL PARK LAND THAT WOULD ALLOW SAND ISLAND BUSINESSES TO REMAIN ON THEIR LEASED PARCELS  
Senate Committees on Water and Land and  
Economic Development, Government Operations and Housing

March 27, 2013

10:45 a.m.

Room 225

The Office of Hawaiian Affairs (OHA) **OPPOSES** SCR130 and SR92, which would urge the Department of Land and Natural Resources (DLNR) to exchange valuable and substantial revenue-generating “ceded” lands in Sand Island, for unspecified properties that may not provide comparably consistent or reliable revenues for the protection and conservation of our natural and cultural resources.

**The lands leased to the Sand Island Business Association (SIBA) are comprised of lands “ceded” to the United States as a result of the unlawful overthrow of the Kingdom of Hawai‘i.**<sup>1</sup> While the timing of the transfer of the subject lands in Sand Island from the federal government to the Territory of Hawai‘i may render them as section 5(a) lands for which OHA receives no revenue, their nature as government lands at the time of annexation places these lands squarely within the ceded lands corpus.<sup>2</sup>

**In order to fulfill its trust responsibilities, the state must maintain the ceded lands corpus until the Native Hawaiian people’s claims to ceded lands have been resolved.**<sup>3</sup> Any further diminishment of the ceded lands corpus will negatively impact reconciliation efforts between Native Hawaiians and the state and the ability to achieve a comprehensive, just, and lasting resolution of these historic injustices. Moreover, the disposal of land from the ceded lands corpus is inconsistent with the state’s established fiduciary duty as trustee to maintain and protect the corpus. A land exchange will substantially hinder the ability of the state to fulfill its fiduciary responsibility to appropriately manage and administer the ceded lands trust.

While Act 235, Session Laws of Hawai‘i 2011, authorized the DLNR to consider a sale or exchange of Sand Island Industrial Park parcels to leaseholders, DLNR is **not** proposing or actively pursuing a land exchange. Instead SIBA has attempted to force DLNR to enter into a sale or land exchange. The only land exchange involving Sand Island that could be appropriate is one that is **substantially** favorable to the State, the ceded lands trust, and its beneficiaries.

**The exchange of the ceded Sand Island lands may also lead to a significant loss of reliable and consistent revenue for the protection, conservation, and management of our natural and cultural resources.** As noted in SCR130/SR92, DLNR objects to the sale or exchange of Sand Island because of the importance of the SIBA lease revenues, which are used to protect, conserve, and manage Hawai‘i’s natural and cultural resources. Even with SIBA paying \$3.9 million below the current fair market rent for its lease, SIBA lease revenues alone still constitute

about 50% of all lease revenues supporting the DLNR's Special Land Development Fund.<sup>4</sup> Accordingly, in a recent January 13, 2013 DLNR staff submittal to the Board of Land and Natural Resources, DLNR staff indicated that any proposal considered by the Land Board should include an additional "significant incentive" to "compensate the department for the loss of its single most important revenue asset and the imposition of greater financial risks." DLNR staff indicated that it does not believe that "a straight exchange (value for value) in this instance would serve a public purpose or be in the best interest of the Department." OHA agrees and would oppose any exchange for Sand Island that does not significantly expand the ceded lands corpus by adding private lands that have (1) a significantly greater value than Sand Island is currently valued (\$175 million) and (2) an equal or greater present income stream that allows the state to recoup the lease value lost under the current lease scheme that contemplated lower initial lease rent that increases over time (currently \$9 million a year, plus periodic step-ups and reopenings over the remaining 36 years of the SIBA lease) than the subject Sand Island lands.

OHA appreciates the concerns that have been previously voiced by SIBA regarding its tenants' potential difficulties in obtaining financing for improvements to their leased properties, due to the leasehold nature of their property interests. However, OHA notes that the DLNR found that after consultation with SIBA, "there was no conclusive evidence that long-term, real estate secured financing was required by a substantial number of SIBA's tenants."<sup>5</sup> OHA further notes that despite this finding, the DLNR nevertheless agreed to conduct a rent reopening schedule to provide a fixed rent through June 30, 2027, allowing individual SIBA tenants to seek both short-term and long-term financing.<sup>6</sup> Given that SIBA continues to "enjoy[] the benefit of paying annual rent that is over \$3.9 million below the current fair market rent [for the SIBA lease]," OHA believes that these concerns have been appropriately addressed.<sup>7</sup>

Therefore, OHA urges the Committees to **HOLD** SCR130 and SR92. Thank you for the opportunity to testify.

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<sup>1</sup> See FINAL REPORT ON THE PUBLIC LAND TRUST, A REPORT TO THE LEGISLATURE OF THE STATE OF HAWAII 50 - 52 (1986) ("Sand Island is all ceded lands.").

<sup>2</sup> *Id.* at 51 (noting that 202 acres of land in Sand Island was transferred to the Territory of Hawai'i just one day before statehood, rendering them as 5(a) and not 5(f) lands); *contrast id.* at 51 ("It is our finding that the DLNR's classification of lands on Sand Island [as 5(a) lands] is technically correct. However, we believe that all of Sand Island is considered a part of the trust established by section 5(f) of the Admission Act and possibly subject to HRS chapter 10").

<sup>3</sup> See, e.g., P.L. 103-150 (1993) ("[T]he Republic of Hawaii . . . ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii, without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government").

<sup>4</sup> See DEPARTMENT OF LAND & NATURAL RESOURCES, REPORT TO THE TWENTY-SIXTH LEGISLATURE REGULAR SESSION OF 2012: PROPOSED SALE OR EXCHANGE OF SAND ISLAND PARCELS 2 (2011) ("[SIBA] currently enjoys the benefit of paying annual rent that is over \$3.9 million below the current fair market rent [for the SIBA lease]").

<sup>5</sup> See DEPARTMENT OF LAND & NATURAL RESOURCES, REPORT TO THE TWENTY-SIXTH LEGISLATURE REGULAR SESSION OF 2012: PROPOSED SALE OR EXCHANGE OF SAND ISLAND PARCELS 2 (2011).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*