ASHBURN & MASON P.C.

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OF COUNSEL JULIAN L. MASON III • A. WILLIAM SAUPE

July 19, 2022

Hand-delivered and Via E-mail

Michelle Rizk
Chief Strategy, Planning and Budgeting Officer
University of Alaska
Land Management
Anchorage Office
1815 Bragaw Street, Suite 101
Anchorage, Alaska 99508-3438
marizk@alaska.edu

Courtesy Copy to:
Laura Carmack
ua-land@alaska.edu

Bid Protest-UAA Lake Otis & Providence Drive Parcel RFP to Lease or Purchase, Tract 1, U-MED Professional Park Subdivision, Parcel No. AN.AC.4017

Dear Ms. Rizk:

I. INTRODUCTION

Pursuant to AS 36.30.560, [redacted] submits this protest of Request for Proposals to Lease or Purchase Land: Tract 1, U-Med Professional Park Subdivision ("RFP"). The RFP sought proposals for the purchase or long-term leasing of Tract 1, U-Med Professional Park Subdivision ("Tract 1"). The RFP allows bidders to submit proposals to buy or lease the parcel but fails to identify the underlying assumptions it will use to make the comparison. As a result, bidders have no way of knowing how to submit the proposal most likely to meet what the University wants.

[redacted] submits this protest because (1) the terms of the RFP are vague such that potential offerors cannot compete intelligently and on a relatively equal basis by not

disclosing important variables that affect fair market value; and (2) the RFP contains unduly restrictive time requirements that are not necessary to satisfy the agency's actual needs.

Therefore, [redacted] requests that University of Alaska (the "University") cancel the RFP and/or issue a revised RFP that permits appropriate competition and provides sufficient information to the offerors and sufficient time to permit them to submit properly priced and competitive proposals.

II. [redacted] CONTACT INFORMATION

[redacted]

[redacted] is represented in this protest by Ashburn & Mason, P.C.

Rebecca E. Lipson; Donald W. McClintock
1227 W 9th Avenue, Ste. 200
Anchorage, Alaska 99501
Phone: (907) 276-4331
Email: becky@anchorlaw.com; don@anchorlaw.com

III. [redacted] PROTEST IS TIMELY

On June 24, 2022, the University issued a RFP with a response period of only 24 business days. AS 36.30.565 provides that pre-award protests are to be filed within ten days of the bid deadline. [redacted] protest of RFP, filed July 19, 2022, is therefore timely under AS 36.30.565 as it was filed ten days before the July 29, 2022 due date of the RFP.

IV. [redacted] IS AN INTERESTED PARTY

[redacted] is an "interested party" as defined in 2 AAC 12.990(a)(7) because it is a "prospective bidder or offeror whose economic interest might be affected substantially and directly by the issuance of a contract solicitation, the award of a contract, or the failure to award a contract." [redacted] timely submitted written concerns to the University regarding the RFP on July 8, 2022.[1] A response was received from the University on July 15, 2022; however, [redacted] identified concerns remain largely unaddressed.[2]

V. REQUEST FOR STAY UNDER AS 36.30.575

[redacted] requests an immediate stay pursuant to AS 36.30.575 of award of any contract under the RFP until this protest has been resolved. A stay may be issued if the procurement officer determines in writing that either of the following conditions are met; and here both are applicable: (1) a reasonable probability exists that the protest will be sustained, or (2) the stay is not contrary to the best interests of the University. As shown below, there is a reasonable probability that if the University continues with the RFP as written, this protest will be sustained. Moreover, staying any award under the RFP is not contrary to the best interests of the University because, due to defects in the RFP, the University will not be receiving competitive and responsive proposals in response to the RFP. By staying any award under AS 36.30.575, the University can ensure that the procurement process for this RFP is conducted in a manner that promotes the best interests of the University. Finally, there is no urgency, but there is irreversible damage, to following the current timeline to dispose of Tract 1, a strategic parcel the University acquired in 2011 after over 20 years of effort and significant investment by the University. A short stay while [redacted] protest is resolved will not prejudice the University or jeopardize the University's ability to generate proposals serving the best interests of the University in the long-run.

VI. FACTUAL BACKGROUND

[1] Attachment A (July 8, 2022 letter from [redacted] to Laura Carmack).
[2] Attachment B (July 15, 2022 letter from Adrienne K. Stolpe to [redacted] .

The University issued the RFP on June 24, 2022. The RFP gives bidders the opportunity to request *either* a long-term lease or a purchase. The history of the parcel and its significance to the University are set forth in the July 8, 2022 letter from [redacted] to Laura Carmack, attached as Exhibit "A" and incorporated by reference. The abbreviated timeline and methodology suggest that this RFP is a directed procurement that only one interested group, who have already been in communication with the University, can respond to within the timeline allowed.

VII. LEGAL BACKGROUND

A fundamental requirement of the public procurement process is that solicitations must not provide an unfair competitive advantage to a particular prospective bidder.[3] Not only must requests for proposals provide sufficient information to enable all offerors to compete intelligently and on a relatively equal basis, but with respect to evaluation of proposals, the agency must adequately inform prospective offerors of the bases upon which their proposals will be evaluated.[4]

VIII. GROUNDS FOR PROTEST

The RFP should be canceled or amended because the RFP does not contain sufficient information to enable offerors to compete intelligently and on a relatively equal basis, and the terms provided are so vague such that potential offerors do not have a meaningful opportunity to understand how their proposal will compete with other proposals; and the expedited timeline for responses has the practical effect of quashing competition such that it gives an unfair competitive advantage to a particular prospective bidder.

The July 15th response issued by the University failed to resolve the above,

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[3] *See e.g. McBirney & Associates v. State*, 753 P.2d 1132, 1136 (Alaska 1988) ("courts have guarded against the award of a public contract to a bidder who has received an unfair competitive advantage over other bidders"); *see also Empyra.com, Inc.*, p. 16, OAH No. 06-0520-PRO, December 19, 2006.

[4] *Empyra.Com, Inc. v. Alaska Permanent Fund Corporation*, OAH No. 06-0520-PRO, December 19, 2006; *In re Bachner Company, Inc. & Bowers Investment Co.*, OAH No. 02.06; 02.07, October 9, 2022 (citing *Appeal of Make It Alaskan, Inc.*, No. 00.11 at 5-10 (Department of Administration, May 1, 2001)).

therefore, the following issues remain:

(1) the RFP does not contain sufficient information to allow offerors to understand how the University will compare a "lease" offer to a "fee simple purchase" for Tract 1.

(2) The 24-business day for a comprehensive response are not sufficient to allow meaningful competition.

A. The process of comparing Leases to Sale prices are vague, do not provide proper guidance to bidders and are subject to manipulation.

During the comment period, the University Land Office was asked "… how the present value of a lease proposal will be calculated and what the applicable discount rate will be." The University of Alaska Land Sales office responded: "… (UA) refrains from specifying a particular discount rate in the RFP. The University has traditionally applied an 8% discount rate, but the University reserves the right to depart from that rate." The University Land Sales office concludes with "the right to apply the simplifying assumption that the likely higher fair market value of the property in the future, discounted to a present-day value, will approximate the current fair market value of the property."

The problem with not providing a set discount rate to determine the Present Value of the Rental Income of the property is that the Present Value of the Property can vary significantly depending on the discount rate (see below chart):

	Discount Rate	PV of Rental Income	PV of Property	"= Rental -Purchase"	Better to Lease or Sale?
Discount Rate for Present Value of Rental Income	6%	$16,131,436	$10,700,000	$5,431,436	Lease
Discount Rate for Present Value of Rental Income	7%	$14,187,977	$10,700,000	$3,487,977	Lease
Discount Rate for Present Value of Rental Income	8%	$12,566,244	$10,700,000	$1,866,244	Lease
Discount Rate for Present Value of Rental Income	9%	$11,204,913	$10,700,000	$504,913	Lease
Discount Rate for Present Value of Rental Income	10%	$10,055,291	$10,700,000	($644,709)	Sale
Changing the Discount Rate for the Present Value can Significantly Change the Present Value of the Property					

The assumptions used are on the attached spreadsheet; but if the goal is to compare the minimum purchase price of $10.7m to the present value of the rental income stream, it

cannot be done without determining what discount rate to use.[5]

The second problem the UA Land Office raises with its answer "the right to apply the simplifying assumption that the likely higher fair market value of the property in the future," is this: what determines the higher fair market value of the future? If the property is sold for $10.7 million today, invests the funds at 8% for 30 years, the future value of the sale is $107.6 million. Comparatively, if the University leases the property using an 8% discount rate (traditionally applied per their response letter) with a $10.7 million property valuation, then the value of the invested (at the same 8% as the sale proceeds) rental income stream inclusive of a 3% annual CPI adjustment will be $130.7 million and the property value will be $25.2 million for a total "future value" of $155.9 million.

Is the University going to compare the $155.9 million "lease methodology" to the $107.6 million "sale methodology"? Or is the University going to compare the Present Value of Rental Income — $10 million to $16 million range — to the Present Value of the Property Sale of $10.7 million?

It is unclear how the University will compare a lease to a sale given the numerous assumptions which will need to be made, all of which are unknown to the bidders. There is no guidance to bidders of how to submit a truly competitive bid without understanding the assumptions being applied. Further, the changes in results created by changes in the assumptions create a very real risk that the University may vary the calculations as part of the scoring process to favor one bidder over the other. Considering that Scoring of Fair Market Value is 55% of the total scoring under the RFP, this is a very significant factor. We do not maintain that the University will do that, but certainly confidence in the process is severely undermined where there is an ability to manipulate the scoring results. Here, the bids are not open publicly and there is no open process to review what has been done until the recommended selection is presented to the Board of Regents for approval.

In short, bidders have no way to understand how a lease proposal will fare against a sale proposal or visa-versa.

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[5] Attachment C (Spreadsheet showing effects of discount rates to fair market value). UAA set a minimum capitalization rate of 8% so the examples of the application of a 7% and 6% cap rate are the ones pertinent here but the 9% and 10% are illustrative of how significant this variable is as applying a 10% capitalization rate yields a negative number.

B. The timeline to allow for responses is too limiting to provide all interested parties to respond with a competitive proposal.

The proposal time for this RFP is 24 business days. When [redacted] objected to this unnecessarily constrained timeline (see Attachment A), UAA responded:

> "The University is reviewing this request and has not made a determination at this time to extend the timeframe of this RFP. All interested parties will be informed once a final determination is made."

The problem of course, is this is a non-answer. Giving another 30 days at the last minute is not the same as giving 60 or 90 days at the outset. Under the current procurement a bidder has no idea of whether it is possible to meet the bidding requirements in the time allotted and that uncertainty chills the incentive to participate.

The RFP requirements are significant and take considerable time, effort and expense to submit a competitive response. In addition to a proposed lease or purchase offer, a bidder must propose a conceptual development plan, a marketing plan, a plan that is compatible with the University's mission, a description of proposed improvements, a site plan, a list of required permits, a management and organization plan, an operating plan and a financing plan. This is a seven-acre plus parcel and to be economic, it will require assembling substantial users for the parcel. Getting commitments for that scope of participation, preparation of preliminary site plans and architectural renderings, as well as lining up the economic feasibility is an effort that typically could take six months on a fast-track basis. Frankly, the only party who could respond within the 24-business day timeline would be a party who has already completed all of this work and approached the University with a proposal. There is nothing nefarious about approaching the University with a proposal but, as an instrumentality of the State, the University cannot use a 24-business day response period to satisfy its competitive solicitation obligations. Such an approach is ineffectual at best and at the worst a sham.[6]

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[6] *See McBirney & Associates v. State*, 753 P.2d 1132, 1135-37 (Alaska 1988)("The purposes of competitive bidding are to prevent fraud, collusion, favoritism, and improvidence in the administration of public business, as well as to insure that the [state] receives the best work or supplies at the most reasonable prices practicable. . . . [T]he requirement of public bidding is for the benefit of property holders and taxpayers, and not for the benefit of the bidders; and such requirements should be construed with the primary purpose of best advancing the public interest.") The court in *McBirney* went on to hold

If the University is expecting truly competitive responses a much longer period must be offered. This is a valuable piece of property located at the gateway to the University and Providence campuses. Given the other developments that has taken place elsewhere in the UMED district on less strategically placed parcels, one can expect significant interest. Twenty-four business days is not adequate time to allow interested parties to gather the commitments and resources needed to make a competitive response.

IX. CONCLUSION

The RFP should be canceled or amended, because the RFP is so ambiguous as to prevent interested parties from submitting proposals, to the detriment of the University. It is respectfully submitted that modifying the current RFP and replacing it with the following 2-part option would cure the existing deficiencies:

(1) Modify the RFP to limit the parcel to a ground lease. The land lease allows the University to retain the parcel, while converting it to a revenue producing asset while maintaining the mission of the University. Evaluating competing proposals would thus be simple: what is the initial ground lease rate proposed, what is the proposed ground lease escalation rate, and what is a discount rate for the lease stream revenue? The high number wins the price scoring section.

(2) Allow a reasonable timeframe (a minimum) of 3 to 4 months for interested parties to thoroughly develop qualified proposals.

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that allowing pre-bid discussions with potential bidders should not affect the competitiveness of the procurement:

> Like the "option to renew" provision in *City of Baltimore*, the pre-solicitation negotiations between McBirney and the state should not be allowed to serve as a vehicle for circumventing the competitive bidding laws. S*ee also American Totalisator Co. v. Seligman*, 34 Pa.Cmwlth. 391, 384 A.2d 242, 262 (1977) ("Private negotiations between a director and a successful bidder through which the terms and conditions of the competitive bids are modified or changed, resulting either to the advantage or disadvantage of the city, are not within the spirit and purpose of the law.") aff'd 489 Pa. 568, 414 A.2d 1037 (1980)).

The above changes would meet the University's requirements and protect its interests while allowing interested parties to offer competitive responses that will be directly comparable when being evaluated by the University.

X. RELIEF REQUESTED

To remedy the deficiencies discussed above, [redacted] respectfully requests the University cancel the RFP and/or issue a revised RFP that permits appropriate competition and provides sufficient information to the offerors to permit them to submit properly priced and appropriate proposals.

Sincerely,

ASHBURN & MASON, P.C.

Donald W. McClintock
s/Rebecca E. Lipson

Attachments:

Attachment A -- July 8, 2022 letter from [redacted] to Laura Carmack.
Attachment B -- July 15, 2022 letter from Adrienne K. Stolpe to [redacted]
Attachment C -- Spreadsheet showing effects of discount rates to fair market value.

July 8, 2022

Ms. Laura Carmack
University of Alaska
Land Management – Anchorage Office
1815 Bragaw Street, Suite 101
Anchorage, AK 99508

Re: University Reconsideration of Request for Proposals to Lease or Purchase Land: Tract 1, U-Med Professional Park Subdivision

Dear Ms. Carmack,

I write this letter to you as a longtime resident of Alaska, a supporter of the University of Alaska,

[redacted]

Tract 1, U-Med Professional Park Subdivision parcel is a strategic parcel in the U-Med District and a valuable asset to the University. It took over 20 years of effort and significant investment by the University to acquire the property in 2011. To simply sell the parcel, and under a hurried process is not in the best interest of any of the stakeholders.

Respectfully, deciding to sell this parcel without taking the time to understand alternative approaches and giving only 19 days to determine the future development of this parcel is shortsighted and easily avoidable.

Please consider the following 3-part option:

1. Modify the RFP to limit the parcel to a ground lease. The land lease allows the University to retain the parcel, while converting it to a revenue producing asset while maintaining the mission of the University.

2. Publish a form of lease with terms and conditions, which meets the needs of a financeable instrument, for clarity and fairness to all interested parties.

3. Allow a reasonable timeframe (a minimum) of 3 months for interested parties to thoroughly develop qualified proposals.

In conclusion, after considerable thought we will not offer a proposal to the RFP as currently written, since it appears to be a directed procurement for a single interested group. However, if the University adopts a fairer approach, [redacted] is qualified and prepared to become an interested party.

This parcel is a key asset of the University and if developed thoughtfully, it will be valuable to supporting the objectives of the University for the next 50-100 years.

Sincerel

[redacted]

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1 Note that after receiving a ground lease application the AMHTA provided a public response period of over 18 months and received no bids due to an un-financeable Ground Lease, then an additional 12 months to perfect a financeable ground lease with the original applicant for its parcel C2.

Adrienne K. Stolpe, Director
Phone: (907) 786-7781
Fax: (907) 786-7733
Email: akstolpe@alaska.edu

UNIVERSITY of ALASKA
LAND MANAGEMENT

University of Alaska System
Land Management
1815 Bragaw Street, Suite 101
Anchorage, AK 99508-3438
Web: www.alaska.edu/ualand

July 15, 2022

[redacted]

Re: UAA Lake Otis & Providence Drive Parcel – RFP to Lease or Purchase
Response for Written Questions

Dear [redacted]

Thank you for your interest in the UAA Lake Otis and Providence Drive Parcel RFP and for your letter dated July 8, 2022 to submit questions and comments regarding the project. Our office has consolidated the questions received and prepared the enclosed Response for Written Questions.

The Response for Written Questions and pertinent third party reports will also be made available on the public notice page for the project on the UA Land Management website:
https://www.alaska.edu/ualand/public-notices/2022/lake-otis-providence-drive.php

Sincerely,

DocuSigned by:
Adrienne Stolpe
A05C50F98B834C1...
Adrienne K. Stolpe

Enclosure

[redacted]

UNIVERSITY of ALASKA

LAND MANAGEMENT

TRACT 1, U-MED PROFESSIONAL PARK SUBDIVISION
Request for Proposals to Lease or Purchase Land
Anchorage, Alaska

Response for Written Questions

- **Please consider modifying the RFP Period to allow a reasonable timeframe for Bidders to thoroughly develop qualified proposals.**

  The University is reviewing this request and has not made a determination at this time to extend the timeframe of this RFP. All interested parties will be informed once a final determination is made.

- **Please consider modifying the RFP to a Lease Option only.**

  The University is reviewing this request and has not made a determination at this time to modify this RFP for a lease option only. All interested parties will be informed once a final determination is made.

- **Please advise whether the RFP anticipates that the Minimum Price be paid equally on an annual basis?**

  The Lease Minimum Price is expressed as an annual figure, but the specification of that figure is not an indication that the actual rental should not exceed that amount, either initially or through increases to be proposed in an escalator clause during the lease term. The University customarily includes an escalator clause in its leases. Those submitting proposals are not required to propose any particular escalator clause, but it is a factor that will be taken into account in bid selections.

- **Further information is requested as to how the present value of a lease proposal will be calculated and what the applicable discount rate will be.**

  Due to recent volatility in interest rates, the University refrains from specifying a particular discount rate in the RFP. The University has traditionally applied an 8% discount rate, but the University reserves the right to depart from that rate. Further, the University will be taking into account the value of the reversionary interest at the expiration of a lease term, and the discount rate applied to that figure may not be the same discount rate applied to the lease payment stream. The University reserves the right to apply the simplifying assumption that the likely higher fair market value of the property in the future, discounted to a present-day value, will approximate the current fair market value of the property.

- **Will the University make any third-party reports in its possession related to the site available to Bidders?**

  The documentation available has been presented under Additional Documents on the UA Land Management Public Notice website page for the RFP (noted below).

UNIVERSITY of ALASKA

LAND MANAGEMENT

TRACT 1, U-MED PROFESSIONAL PARK SUBDIVISION
Request for Proposals to Lease or Purchase Land
Anchorage, Alaska

- **Please provide the University documents that will be utilized for the sale or lease of the parcel.**

  The following documentation has been incorporated as University Documentation on the UA Land Management Public Notice page for the RFP (noted below)

  - Cash Sale – Purchase Agreement
  - Cash Sale – Quitclaim Deed
  - Ground Lease form

RFP Public Notice Webpage Where Documentation is Available:
https://www.alaska.edu/ualand/public-notices/2022/lake-otis-providence-drive.php

ONLY CHANGE NUMBERS in BLUE FONT!!

Property Square Footage from GIS	311,976	
Property Value/sale price	$10,700,000	
Property Value/Square Foot	$34.30	
Discount Rate for Annual Land Lease Payment	**8%**	assumption from UAA comment
Annual Land Lease Pmt/SF	$2.74	
Annual Land Lease Pmt	$856,000	
Annual Lease Escalation	**3%**	assumption from UAA comment

	Annual Rental Income	Present Value	Month For PV	Land Value	Rental Income Investment Balance	Income + Land Value
Year 1	$856,000	$774,861.84	12	$10,700,000	$856,000	$11,556,000
Year 2	$881,680	$722,457.01	24	$11,021,000	$1,806,160	$12,827,160
Year 3	$908,130	$673,596.37	36	$11,351,630	$2,858,783	$14,210,413
Year 4	$935,374	$628,040.24	48	$11,692,179	$4,022,860	$15,715,039
Year 5	$963,436	$585,565.13	60	$12,042,944	$5,308,125	$17,351,069
Year 6	$992,339	$545,962.66	72	$12,404,233	$6,725,113	$19,129,346
Year 7	$1,022,109	$509,038.55	84	$12,776,360	$8,285,231	$21,061,590
Year 8	$1,052,772	$474,611.66	96	$13,159,650	$10,000,821	$23,160,472
Year 9	$1,084,355	$442,513.11	108	$13,554,440	$11,885,242	$25,439,682
Year 10	$1,116,886	$412,585.42	120	$13,961,073	$13,952,948	$27,914,021
Year 11	$1,150,392	$384,681.77	132	$14,379,905	$16,219,576	$30,599,481
Year 12	$1,184,904	$358,665.28	144	$14,811,302	$18,702,046	$33,513,348
Year 13	$1,220,451	$334,408.32	156	$15,255,641	$21,418,661	$36,674,303
Year 14	$1,257,065	$311,791.89	168	$15,713,311	$24,389,219	$40,102,529
Year 15	$1,294,777	$290,705.03	180	$16,184,710	$27,635,133	$43,819,843
Year 16	$1,333,620	$271,044.30	192	$16,670,251	$31,179,564	$47,849,815
Year 17	$1,373,629	$252,713.25	204	$17,170,359	$35,047,558	$52,217,917
Year 18	$1,414,838	$235,621.95	216	$17,685,470	$39,266,200	$56,951,669
Year 19	$1,457,283	$219,686.55	228	$18,216,034	$43,864,779	$62,080,812
Year 20	$1,501,001	$204,828.89	240	$18,762,515	$48,874,962	$67,637,477
Year 21	$1,546,031	$190,976.07	252	$19,325,390	$54,330,990	$73,656,380
Year 22	$1,592,412	$178,060.13	264	$19,905,152	$60,269,882	$80,175,033
Year 23	$1,640,185	$166,017.71	276	$20,502,306	$66,731,657	$87,233,963
Year 24	$1,689,390	$154,789.73	288	$21,117,376	$73,759,579	$94,876,955
Year 25	$1,740,072	$144,321.12	300	$21,750,897	$81,400,417	$103,151,314
Year 26	$1,792,274	$134,560.51	312	$22,403,424	$89,704,724	$112,108,148
Year 27	$1,846,042	$125,460.02	324	$23,075,527	$98,727,145	$121,802,671
Year 28	$1,901,423	$116,975.01	336	$23,767,792	$108,526,740	$132,294,532
Year 29	$1,958,466	$109,063.85	348	$24,480,826	$119,167,345	$143,648,171
Year 30	$2,017,220	$101,687.73	360	$25,215,251	$130,717,952	$155,933,203
	$40,724,556	$10,055,291				

Sale Price of Property	investment rate	Income Investment Balance
$10,700,000	8%	$11,556,000
		$12,480,480
		$13,478,918
		$14,557,232
		$15,721,810
		$16,979,555
		$18,337,920
		$19,804,953
		$21,389,350
		$23,100,497
		$24,948,537
		$26,944,420
		$29,099,974
		$31,427,972
		$33,942,210
		$36,657,586
		$39,590,193
		$42,757,409
		$46,178,001
		$49,872,241
		$53,862,021
		$58,170,982
		$79,140,979
		$85,472,258
		$92,310,038
		$99,694,841
		$107,670,429

Discount Rate for Present Value for Rental Income Model 10%

		PV of Rental Income	PV of Property	"= Rental -Purchase"	Better to Lease or Sale?
Discount Rate for Present Value of Rental Income	6%	$16,131,436	$10,700,000	$5,431,436	Lease
Discount Rate for Present Value of Rental Income	7%	$14,187,977	$10,700,000	$3,487,977	Lease
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Discount Rate for Present Value of Rental Income	9%	$11,204,913	$10,700,000	$504,913	Lease
Discount Rate for Present Value of Rental Income	10%	$10,055,291	$10,700,000	($644,709)	Sale

Changing the Discount Rate for the Present Value can Significantly Change the Present Value of the Property