



## AGENDA ITEM EXECUTIVE SUMMARY

Agenda Item number: 7a

Title:

Continued Discussion Concerning Carriage Oaks Senior Affordable House.

Presenter:

Mark Koenen and John McGuirk

Meeting: Government Operations Committee

Date: January 22, 2019

Proposed Cost: \$NA

Budgeted Amount: \$NA

Not Budgeted: ☐

### **Executive Summary** (if not budgeted please explain):

Request- Essex Corporation, proposed buyer, of d/b/a Carriage Oaks (1500 S. 14<sup>th</sup> Street), is requesting the City to approve their purchase of the senior independent living not-for-profit facility from Carriage Oaks of St Charles.

Background- In 1996 the City and Township of St Charles accepted the role of “sponsor member(s)” for Carriage Oaks. For your information, residents of the facility are “resident members”. Essex Corporation is looking for the City and Township to approve this property transaction. The City and Township have had representatives (sponsors) historically on the Carriage Oaks board. It appears the City engagement with Carriage Oaks has been limited and since 2013, City elected and staff members have had no involvement (other than an occasional social event) with the facility.

The City issued industrial revenue bonds (IRB) originally for this residential development to lower “buy-in” ownership for seniors. With a sale of Carriage Oaks the outstanding IRB would be paid off.

If the sale were to be approved by the Township, City and residents; Carriage Oaks would likely become property of Essex Corporation and exist like any market rate apartment complex. For your information, the resident members voted on November 15 (70 “yes” and 9 “no”) to approve the sale. The Township, sponsor member, at their December 15 meeting requested their legal counsel to secure indemnity language.

Discussion- At the December 17 Government Operations Committee meeting there was concern about taking action acknowledging our limited understanding of the facility’s financial and operational history. Like the Township there was also concern about liability. Atty. McGuirk has received and reviewed a document between among parties and the City entitled “Notice of Sponsor Member Resignation and Release and Agreement to Indemnify and Hold Harmless”. Signatories of this document (the *property owner*- Carriage Oaks of St Charles, Illinois, an Illinois nonprofit corporation, *facility operator/manager*- Essex Corporation, a Nebraska Corporation and *property purchaser*- Carriage Oaks STC, LLC, an Illinois limited liability company) would all provide the City with a release of liability and agree to indemnity, defend and hold the City harmless. Execution of this document is contingent on the City resigning as a sponsor member.

### **Attachments** (please list):

Notice of Sponsor Member Resignation and Release and Agreement to Indemnify and Hold Harmless.

### **Recommendation/Suggested Action** (briefly explain):

Staff recommends we accept the agreement and advance same to the Council meeting for approval.

## NOTICE OF SPONSOR MEMBER RESIGNATION

-----

### RELEASE AND AGREEMENT TO INDEMNIFY AND HOLD HARMLESS

**THIS NOTICE AND AGREEMENT** (collectively this "Agreement") is entered into among the City of St. Charles, Illinois, an Illinois municipality ("City"), Carriage Oaks of St. Charles, an Illinois nonprofit corporation, doing business as Carriage Oaks ("Carriage Oaks"), Essex Corporation, a Nebraska Corporation ("Essex"), and Carriage Oaks STC, LLC, an Illinois limited liability company (the "Buyer").

#### RECITALS:

- A. Carriage Oaks owns and operates a senior independent living facility located in St. Charles, Illinois, which has received a federal income tax exemption as a not for profit entity operated as an Internal Revenue Code section 501(c)(3) entity;
- B. At the time that the legal entity of Carriage Oaks was formed under the nonprofit corporation laws of the State of Illinois, the City was nominated to serve as a "sponsor member" of Carriage Oaks, as such sponsor member designation was identified under the bylaws and articles of organization for Carriage Oaks ("Sponsor Member");
- C. The rights, powers and authorities of the City to act as a Sponsor Member of Carriage Oaks included the right to appoint one or more persons to the board of directors for Carriage Oaks, and to vote on certain matters that may be brought to a membership vote from time to time;
- D. As of October 25, 2018, Carriage Oaks served notice on the Sponsor Member of a membership meeting (a meeting of the sponsor members and the resident members) to occur on November 15, 2018, wherein the vote of all members was to occur to either approve or decline to sell all or substantially all of the assets of Carriage Oaks, other than in the usual and regular conduct of its business, with an eventual liquidation of Carriage Oaks, to the Buyer ("Membership Meeting");
- E. On November 15, 2018, the resident member class of Carriage Oaks approved the sale of the sale of all or substantially all of the assets of Carriage Oaks, other than in the usual and regular conduct of its business, with an eventual liquidation of Carriage Oaks to the Buyer. The City has not taken any action as a Sponsor Member with respect to the Membership Meeting, nor did the City attend such meeting; and
- F. Since the date of formation of Carriage Oaks, and to the date hereof, the City has had nominal contact with the operations and activities of Carriage Oaks. The City is intending to resign as a Sponsor Member of Carriage Oaks in accordance with the terms and provisions of this Agreement in lieu of taking any action to either approve or disapprove of the pending member proposal for Carriage Oaks to sell its assets to the Buyer.

THEREFORE, the parties state and agree:

#### **A. NOTICE OF RESIGNATION**

**Notice of Resignation.** The undersigned City, being nominated as a Sponsor Member of Carriage Oaks, does hereby state that the City hereby resigns as a Sponsor Member for Carriage Oaks, and does further decline to act or serve in any such capacity as a Sponsor Member to Carriage Oaks. Such resignation shall be deemed to be effective as of November 15, 2018, despite the approval of, or execution of this document after November 15, 2018.

#### **B. CARRIAGE OAKS RELEASE AND AGREEMENT TO INDEMNIFY AND HOLD HARMLESS**

1. **Release from Liability.** In consideration of this Agreement, Carriage Oaks hereby waives all claims and releases the City, its Mayor, its city council, and all related directors, officers, staff, volunteers and agents (collectively, "Released Parties"), from any and all loss, liability or damage resulting: (i) from the City's resignation as Sponsor Member of Carriage Oaks under the terms and provisions of this Agreement, which such waiver and release shall occur incident to the City's resignation as a Sponsor Member of Carriage Oaks without taking any action (either for or against) related to the meeting of the members of Carriage Oaks which occurred on November 15, 2018; (ii) from the action or non-action related to the appointment of a board member (or the failure to appoint a board member) by the City as authorized under the Bylaws for Carriage Oaks; and (iii) from the defeasance of the bonds which identify the real property owned by Carriage Oaks and the distribution of sales proceeds from the transaction approved in the Membership Meeting. In this regard, such waiver and release by Carriage Oaks shall include any and all actions, suits, proceedings, claims, demands, assessments, judgments, costs and expenses, including, without limitation, legal fees and expenses, on the part of Carriage Oaks against the Released Parties incident to any of the foregoing or incurred in investigating or attempting to avoid the same or to oppose the imposition thereof. Notwithstanding the foregoing, such waiver and release by Carriage Oaks shall not include any action or non-action by the City that involved willful or wanton conduct.
2. **Indemnification and Hold Harmless.** In consideration of this Agreement, Carriage Oaks hereby agrees to indemnify, defend and hold the City, its Mayor, its city council, and all related directors, officers, staff, volunteers and agents (collectively, "Released Parties") harmless, from any and all loss, liability or damage resulting: (i) from the City's resignation as Sponsor Member of Carriage Oaks under the terms and provisions of this Agreement, which such waiver and release shall occur incident to the City's resignation as a Sponsor Member of Carriage Oaks without taking any action (either for or against) related to the meeting of the members of Carriage Oaks which occurred on November 15, 2018; (ii) from the action or non-action related to the appointment of a board member (or the failure to appoint a board member) by the City as authorized under the Bylaws for Carriage Oaks; and (iii) from the defeasance of the bonds which identify the real property owned by Carriage Oaks and the distribution of sales proceeds from the transaction approved in the Membership Meeting, including any loss or expense related to any audit by the IRS with respect to the tax exempt status on the bonds. In this regard, such indemnification and hold harmless agreement by Carriage Oaks shall include any and all actions, suits, proceedings, claims, demands, assessments,

judgments, costs and expenses, including, without limitation, legal fees and expenses, on the part of Carriage Oaks, or its members, against the Released Parties incident to any of the foregoing or incurred in investigating or attempting to avoid the same or to oppose the imposition thereof. Notwithstanding the foregoing, such indemnification and hold harmless provision by Carriage Oaks shall not include any action or non-action by the City that involved willful or wanton conduct.

### **C. THE BUYER'S RELEASE AND AGREEMENT TO INDEMNIFY AND HOLD HARMLESS**

Each of the parties hereby consent and agree that the following two provisions under this heading C. shall only be effective and enforceable against the Buyer as of the closing of the transaction between Carriage Oaks and the Buyer, whereby Carriage Oaks is intending to sell all or substantially all of its assets to the Buyer, and Buyer is intending to purchase such assets. In the event that the said transaction between the Buyer and Carriage Oaks does not close as of August 1, 2019, the parties hereby consent and agree that the following two provisions under this heading C. shall be null and void, without any further force or effect.

3. **Release from Liability.** In consideration of this Agreement, Buyer hereby waives all claims and releases the City, its Mayor, its city council, and all related directors, officers, staff, volunteers and agents (collectively, "Released Parties"), from any and all loss, liability or damage resulting: (i) from the City's resignation as Sponsor Member of Carriage Oaks under the terms and provisions of this Agreement, which such waiver and release shall occur incident to the City's resignation as a Sponsor Member of Carriage Oaks without taking any action (either for or against) related to the meeting of the members of Carriage Oaks which occurred on November 15, 2018; (ii) from the action or non-action related to the appointment of a board member (or the failure to appoint a board member) by the City as authorized under the Bylaws for Carriage Oaks; and (iii) from the defeasance of the bonds which identify the real property owned by Carriage Oaks and the distribution of sales proceeds from the transaction approved in the Membership Meeting. In this regard, such waiver and release by Buyer shall include any and all actions, suits, proceedings, claims, demands, assessments, judgments, costs and expenses, including, without limitation, legal fees and expenses, on the part of Buyer against the Released Parties incident to any of the foregoing or incurred in investigating or attempting to avoid the same or to oppose the imposition thereof. Notwithstanding the foregoing, such waiver and release by the Buyer shall not include any action or non-action by the City that involved willful or wanton conduct.
4. **Indemnification and Hold Harmless.** In consideration of this Agreement, Buyer hereby agrees to indemnify, defend and hold the City, its Mayor, its city council, and all related directors, officers, staff, volunteers and agents (collectively, "Released Parties") harmless, from any and all loss, liability or damage resulting: (i) from the City's resignation as Sponsor Member of Carriage Oaks under the terms and provisions of this Agreement, which such waiver and release shall occur incident to the City's resignation as a Sponsor Member of Carriage Oaks without taking any action (either for or against) related to the meeting of the members of Carriage Oaks which occurred on November 15, 2018; (ii) from the action or non-action related to the appointment of a board member (or the failure to appoint a board member) by the City as authorized under the Bylaws for Carriage Oaks; and (iii) from the defeasance of the bonds which identify the real property owned by Carriage Oaks and the distribution of sales proceeds from the transaction approved in the Membership Meeting, including any loss or expense related

to any audit by the IRS with respect to the tax exempt status on the bonds. In this regard, such indemnification and hold harmless agreement by Buyer shall include any and all actions, suits, proceedings, claims, demands, assessments, judgments, costs and expenses, including, without limitation, legal fees and expenses, on the part of Buyer against the Released Parties incident to any of the foregoing or incurred in investigating or attempting to avoid the same or to oppose the imposition thereof. Notwithstanding the foregoing, such indemnification and hold harmless provision by Buyer shall not include any action or non-action by the City that involved willful or wanton conduct.

#### **D. ESSEX'S RELEASE AND AGREEMENT TO INDEMNIFY AND HOLD HARMLESS**

Each of the parties hereby consent and agree that the following two provisions under this heading D. shall only be effective and enforceable against Essex as of the closing of the transaction between Carriage Oaks and the Buyer, whereby Carriage Oaks is intending to sell all or substantially all of its assets to the Buyer, and Buyer is intending to purchase such assets; and provided, however, that Essex is serving as manager or agent of the facility for the Buyer at the time that such demand is made by the City for indemnification, or to otherwise be held harmless as set forth below. In the event that the said transaction between the Buyer and Carriage Oaks does not close as of August 1, 2019, the parties hereby consent and agree that the following two provisions under this heading D. shall be null and void, without any further force or effect.

5. **Release from Liability.** In consideration of this Agreement, Essex hereby waives all claims and releases the City, its Mayor, its city council, and all related directors, officers, staff, volunteers and agents (collectively, "Released Parties"), from any and all loss, liability or damage resulting: (i) from the City's resignation as Sponsor Member of Carriage Oaks under the terms and provisions of this Agreement, which such waiver and release shall occur incident to the City's resignation as a Sponsor Member of Carriage Oaks without taking any action (either for or against) related to the meeting of the members of Carriage Oaks which occurred on November 15, 2018; (ii) from the action or non-action related to the appointment of a board member (or the failure to appoint a board member) by the City as authorized under the Bylaws for Carriage Oaks; and (iii) from the defeasance of the bonds which identify the real property owned by Carriage Oaks and the distribution of sales proceeds from the transaction approved in the Membership Meeting. In this regard, such waiver and release by Essex shall include any and all actions, suits, proceedings, claims, demands, assessments, judgments, costs and expenses, including, without limitation, legal fees and expenses, on the part of Essex against the Released Parties incident to any of the foregoing or incurred in investigating or attempting to avoid the same or to oppose the imposition thereof. Notwithstanding the foregoing, such waiver and release by Essex shall not include any action or non-action by the City that involved willful or wanton conduct.
6. **Indemnification and Hold Harmless.** In consideration of this Agreement, Essex hereby agrees to indemnify, defend and hold the City, its Mayor, its city council, and all related directors, officers, staff, volunteers and agents (collectively, "Released Parties") harmless, from any and all loss, liability or damage resulting: (i) from the City's resignation as Sponsor Member of Carriage Oaks under the terms and provisions of this Agreement, which such waiver and release shall occur incident to the City's resignation as a Sponsor Member of Carriage Oaks without taking any action (either for or against)

related to the meeting of the members of Carriage Oaks which occurred on November 15, 2018; (ii) from the action or non-action related to the appointment of a board member (or the failure to appoint a board member) by the City as authorized under the Bylaws for Carriage Oaks; and (iii) from the defeasance of the bonds which identify the real property owned by Carriage Oaks and the distribution of sales proceeds from the transaction approved in the Membership Meeting, including any loss or expense related to any audit by the IRS with respect to the tax exempt status on the bonds. In this regard, such indemnification and hold harmless agreement by Essex shall include any and all actions, suits, proceedings, claims, demands, assessments, judgments, costs and expenses, including, without limitation, legal fees and expenses, on the part of Essex against the Released Parties incident to any of the foregoing or incurred in investigating or attempting to avoid the same or to oppose the imposition thereof. Notwithstanding the foregoing, such indemnification and hold harmless provision by Essex shall not include any action or non-action by the City that involved willful or wanton conduct.

## **E. MISCELLANEOUS PROVISIONS**

7. **Governing Law.** The validity, construction, and effect of this Agreement shall be determined in accordance with the laws of Illinois.
8. **Entire Agreement; Amendment.** This Agreement represents the complete expression of the intentions of the parties with regard to the matters set forth herein, constitutes the entire agreement between the parties, and supersedes all prior agreements, whether written or oral, between the parties. This Agreement shall not be altered, modified, or amended except by an express writing by the parties.
9. **Successors and Others Bound.** Each party agrees that this Agreement is fully binding upon the party's respective successors, heirs, assigns, transferees, representatives, agents, guardians, and personal representatives.
10. **Context of Words; Presumptions.** Whenever the context of this Agreement requires, the gender of all words shall include the masculine, feminine, and neuter, and the number of all words shall include the singular and plural. It is acknowledged that the parties and their respective legal counsel have participated in arm's-length negotiations in the preparation of this Agreement. As a consequence, the parties agree that no presumption shall be applied in any interpretation of this Agreement that the terms hereof shall be more strictly construed against any party by reason of any rule of construction that a document is to be more strictly construed against the party who prepared the same, whether through such party's legal counsel or otherwise.
11. **Further Action.** Each party agrees to take such further action as may be reasonably necessary to effectuate the consummation of this Agreement, including the execution of such documents as may be necessary to effectuate such consummation.
12. **Invalidity.** The parties agree the provisions of this Agreement are severable, and if any provision of this Agreement, as applied to any party or to any circumstance, shall be found by a court of competent jurisdiction to be void, invalid or unenforceable, the same shall in no way affect any other provision of this Agreement, the application of any such

provision in any other circumstance, or the validity or enforceability of this Agreement except as provided herein.

13. **Counterparts.** This Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original and all of which together shall be deemed to be one and the same instrument. Delivery of an executed counterpart of a signature page to this Agreement by facsimile transmission or electronic mail shall be as effective as delivery of a manually executed counterpart thereof. For proof purposes, it shall not be necessary to produce or account for all counterparts, and copies, facsimile copies, and/or email copies of original signatures may be used.

Dated, \_\_\_\_\_

City of St. Charles

By: \_\_\_\_\_  
\_\_\_\_\_,  
Authorized Representative

Dated, \_\_\_\_\_

Carriage Oaks of St. Charles, an Illinois not for profit corporation

By: \_\_\_\_\_  
\_\_\_\_\_,  
Authorized Representative

Dated, \_\_\_\_\_

Carriage Oaks STC, LLC, an Illinois limited liability company

By: \_\_\_\_\_  
\_\_\_\_\_,  
Authorized Representative

Dated, \_\_\_\_\_

Essex Corporation, a Nebraska Corporation

By: \_\_\_\_\_  
\_\_\_\_\_,  
Authorized Officer