

**CITY OF HAMILTON**

**PLANNING AND ECONOMIC DEVELOPMENT DEPARTMENT  
Growth Management Division**

<b>TO:</b> Chair and Members Planning Committee	<b>WARD(S) AFFECTED:</b> WARD 7
<b>COMMITTEE DATE:</b> August 14, 2012	
<b>SUBJECT/REPORT NO:</b> Fulfilment of the City's 'Best Efforts' Obligation to Paul Silvestri Under 'Olmsted Park - Phase 1' Subdivision Plan, Hamilton (PED12136) (Ward 7)	
<b>SUBMITTED BY:</b> Tim McCabe General Manager Planning and Economic Development Department	<b>PREPARED BY:</b> Mark Inrig (905) 546-2424 Ext. 4303
<b>SIGNATURE:</b>	

**RECOMMENDATION:**

- (a) That the General Manager of Planning and Economic Development Department be authorized and directed to pay the sum of \$37,798.29, consisting of \$25,379.78 construction cost, plus \$12,418.51 indexing, to Paul Silvestri in fulfilment of the City's 'Best Efforts' obligation under its Subdivision Agreement for 'Olmsted Park - Phase 1', Plan 62M-864.
- (b) That the General Manager of Finance and Corporate Services be authorized and directed to fund the payment of \$37,798.29 from Capital Account 59212 4140746100.

**EXECUTIVE SUMMARY**

This Report concerns fulfilment of the City's contractual obligation to the developer, Paul Silvestri, under its 'Best Efforts' provision of the Subdivision Agreement for 'Olmsted Park - Phase 1', for the cost of sewers and watermain works installed and paid

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by Silvestri on Marilyn Court abutting the lands of 'DiCenzo Gardens - Phase 9' subdivision plan. The 'Best Efforts' recovery by the City, on behalf of Silvestri, was not realized when the abutting 'DiCenzo Gardens' subdivision plan was registered due to the timing of approvals for the two subdivision draft plans.

The draft plan of subdivision for 'DiCenzo Gardens' (the abutting property) was approved in 1987, whereas 'Olmsted Park' draft plan (front ending developer) did not receive approval until ten years later, in 1997. Thus, there was no condition imposed on 'DiCenzo Gardens' draft plan requiring payment of outstanding servicing costs to Silvestri because 'Olmsted Park' did not exist when 'DiCenzo Gardens' draft plan was approved. Over the past 20 years, 'DiCenzo Gardens' draft plan has developed in various phases, with the southerly portion of the plan abutting 'Olmsted Park' subdivision remaining undeveloped. 'Olmsted Park - Phase 1' subdivision plan was registered in 1998, ahead of 'Di Cenzo Gardens - Phase 9' plan. Under 'Olmsted Park - Phase 1' Subdivision Agreement, the City obligated itself to recover servicing costs from the abutting DiCenzo lands, which were already draft approved at the time. Consequently, when 'DiCenzo Gardens - Phase 9' subdivision plan was eventually registered in 2007, the servicing costs due to Silvestri for 'Olmsted Park - Phase 1' were excluded from the 'DiCenzo Gardens - Phase 9' Subdivision Agreement, as there was no condition requiring payment by DiCenzo.

Upon consultation by Development staff, the Legal Services Division advised that in spite of the way in which the approval and servicing of the two subdivision plans unfolded over the years, in this unique case, the City is ultimately responsible for the cost recovery exclusion from DiCenzo's Subdivision Agreement because DiCenzo's draft approval was not amended to include a requirement to pay outstanding servicing costs after the Silvestri lands developed. Further, it is incumbent on the City to bring closure to this matter by fulfilling its contractual obligation to Silvestri. For this reason, staff has recommended that the City fulfil its commitment to Silvestri from its own financial resources.

*Alternatives for Consideration – See Page 4.*

**FINANCIAL / STAFFING / LEGAL IMPLICATIONS (for Recommendation(s) only)**

**Financial:** Payment for the development-related infrastructure to come from Capital Account 4140746100 (City Share of Servicing Costs), which was originally funded from Development Charges.

**Staffing:** None.

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**Legal:** The recommendation in this Report satisfies the City's legal and contractual obligations under its Subdivision Agreement with the developer, Paul Silvestri, and for this reason, there is no legal implication to the City.

**HISTORICAL BACKGROUND** (Chronology of events)

In 1998, Paul Silvestri registered 'Olmsted Park - Phase 1', Subdivision Plan 62M-864, and created Marilyn Court, which abuts the north side of Rymal Road East immediately west of Upper Wellington Street on the central Hamilton mountain. Silvestri entered into a Subdivision Agreement with the former Region of Hamilton-Wentworth to construct sewers and watermains, at his own cost, on Marilyn Court to service the lands of 'Olmsted Park - Phase 1' subdivision. These works also abutted vacant lands of DiCenzo Construction Company Limited along the north side of Marilyn Court.

In accordance with the Region's financial policy, DiCenzo's lands were identified in the Subdivision Agreement with Silvestri as benefiting from the works installed by Silvestri. A proportionate share of the sewer and watermain costs on Marilyn Court related to DiCenzo's lands was identified for recovery by the former Region, now the City, on behalf of Silvestri, under its 'Best Efforts' obligation in the Subdivision Agreement when the DiCenzo lands developed. The total frontage of the DiCenzo lands abutting Marilyn Court is 80.49 metres.

In 2000, a portion of the DiCenzo lands were subdivided under Consent Application B-99:6, 7 and 8. As a condition of the Consent Application, a recovery for the cost of works on Marilyn Court was made by the City, on behalf of Silvestri, for 29.988 metres of frontage. The remaining DiCenzo lands abutting Marilyn Court (50.502m) form part of 'DiCenzo Gardens' draft plan of subdivision under Application 25T-86008. The 'DiCenzo Gardens' subdivision draft plan was approved in 1987, and pre-dates the 'Olmsted Park' subdivision plan. Therefore, no condition was imposed under 'DiCenzo Gardens' subdivision approval to pay outstanding servicing costs for works installed by Silvestri on Marilyn Court because Silvestri's subdivision plan did not exist at the time 'DiCenzo Gardens' draft plan was approved. Consequently, the cost recovery for existing works on Marilyn Court was omitted from the 'DiCenzo Gardens - Phase 9' Subdivision Agreement.

**POLICY IMPLICATIONS**

The recommendation in this Report simply fulfils a contractual obligation in accordance with the City's existing financial policy with no impact to the policy.

**RELEVANT CONSULTATION**

The Legal Services Division was consulted on this matter, and advised that the City must fulfil its contractual obligation to Paul Silvestri because the commitment is within a signed Subdivision Agreement between the City and Silvestri. In accordance with Legal Services' direction, the Corporate Services Department was consulted to recommend the source of funding.

**ANALYSIS / RATIONALE FOR RECOMMENDATION**

(include Performance Measurement/Benchmarking Data, if applicable)

A key point in this cost recovery issue is that as a matter of established process, the City typically satisfies its 'Best Efforts' obligations to a front-ending developer by using its powers as an approval authority over a benefiting land owner by imposing a requirement to pay their proportionate share of servicing costs as a condition of an application to subdivide the benefiting lands. This has been the practice of the City since inception of its 'Best Efforts' policy in 1991. However, due to the circumstances arising out of the timing of approvals and development of the two subdivision plans, the opportunity to recover monies from DiCenzo was lost at the City's established point for cost recovery in the development process and, ultimately, the City is responsible to Silvestri for the exclusion.

Upon analysis of this unusual situation, Development staff has incorporated a data base module into its existing Development Application Tracking System to record all 'Best Efforts' obligations under the City's Subdivision Agreements. The tracking system now shows all subdivisions where the City has made an obligation for 'Best Efforts' cost recoveries, the streets in which the works are constructed, as well as properties abutting and benefiting from the works. The calculated recovery rates for the municipal works are also recorded in the data base, as well as payments received by the City for each benefiting property, so that Development staff can quickly identify properties where servicing costs are outstanding. This data base module has been made available to all Development staff.

**ALTERNATIVES FOR CONSIDERATION:**

(include Financial, Staffing, Legal and Policy Implications and pros and cons for each alternative)

Prior to bringing forth the recommendation in this Report, staff considered the following options.

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1. Advise Silvestri that the City has made all reasonable attempts on their behalf to acquire payment from the abutting landowner and the City now considers it's 'Best Efforts' obligation fulfilled and, for this reason, no further attempts to elicit payment from the benefiting landowner will be made, and the matter is considered closed.
2. Wait until the next phase of 'DiCenzo Gardens' is brought forward for registration, and include the outstanding servicing costs for Marilyn Court in the next phase Subdivision Agreement as a cash payment to be made prior to execution of the agreement and registration of the subdivision plan.

Staff was advised by the Legal Services Division that Alternative 1 was insufficient to fulfil the City's obligation to Silvestri, and by imposing the outstanding charges on subsequent phases of 'DiCenzo Gardens' draft plan under Alternative 2, the City would be over stepping its powers as an approval authority under the Planning Act because the requirement to pay was never a condition of the subdivision application. Legal staff emphasized that the City must bring this matter to a conclusion now that several years have passed, and no monies have been recovered since registration of 'DiCenzo Gardens - Phase 9' subdivision plan.

**CORPORATE STRATEGIC PLAN (Linkage to Desired End Results)**

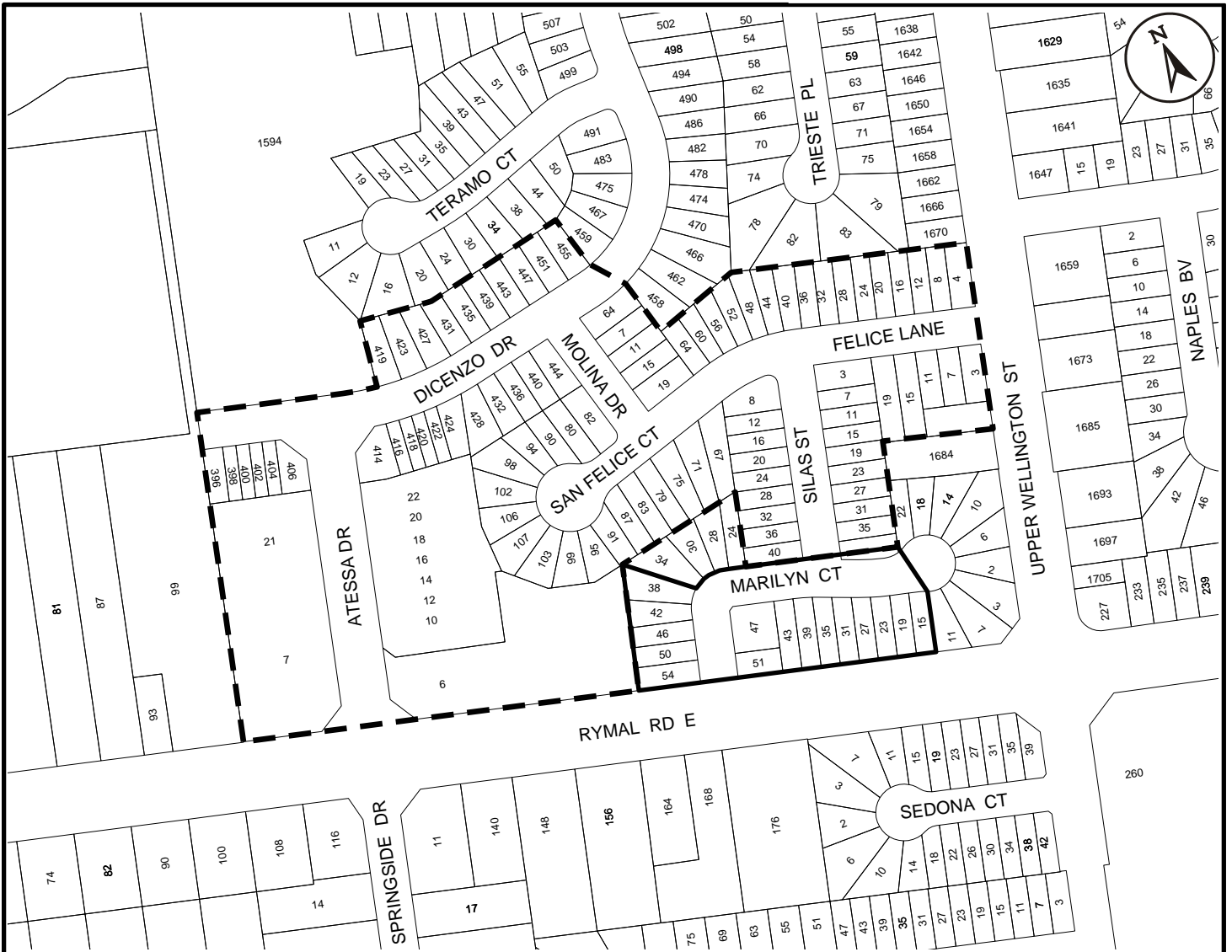
Focus Areas: 1. Skilled, Innovative and Respectful Organization, 2. Financial Sustainability, 3. Intergovernmental Relationships, 4. Growing Our Economy, 5. Social Development, 6. Environmental Stewardship, 7. Healthy Community

- N.A.

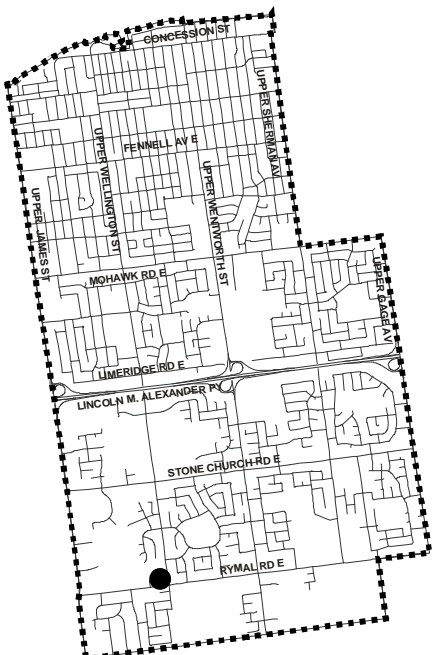
**APPENDICES / SCHEDULES**

Appendix 'A': Location Map to Report PED12136


:MJI/ra  
Attach. (1)



● Site of the Application



Ward 7 Key Map

N.T.S. 



# Location Map



PLANNING AND ECONOMIC DEVELOPMENT DEPARTMENT

<b>File Name/Number:</b> UpperWellingtonSt&RymalRdE		<b>Date:</b> May 23, 2012
<b>Appendix "A"</b>	<b>Scale:</b> N.T.S.	<b>Planner/Technician:</b> MI/NB

**Subject Property**

-  DiCenzo Gardens Phase 9
-  Olmsted Park Phase 1