

CITY OF ROCHESTER, NEW HAMPSHIRE
ZONING BOARD OF ADJUSTMENT

Case number 2017-16

Eco-Site and T-Mobile, applicants

Application for a Special Exception for the construction of a wireless communication facility

Pursuant to Article 42.22 Section 14

AND

Case number 2017-17

Eco-Site and T-Mobile, applicants

Application for a Variance to permit a wireless communication facility

taller than the maximum building height according to Article 42 Table 19A.

Location: 144 Meaderboro Road, Rochester, NH 03867, 0232-0016-0003, in the Agricultural Zone.

ABUTTERS' MOTION FOR REHEARING

NOW COMES a coalition of the Meaderboro Road abutters and interested parties (collectively, "the Abutters"¹), by and through their attorneys Donahue, Tucker, & Ciandella, PLLC, and respectfully submits this Motion for Rehearing in connection with the above-captioned matters. In support thereof, the Abutters state as follows:

I. Summary

1. The Abutters respectfully request that the Zoning Board of Adjustment ("the ZBA") rehear the above-captioned matters given that the decisions rendered in the above-captioned matter are

¹ Michael Clauss, Andrea Veal, Kurt Olson, Norm and Becky Ellis, Pamela and Paul Ward, Dale and Eileen Hickman, and Lane and Jennifer Beatty

unlawful and unreasonable because, *inter alia*, clear procedural errors were made despite clear notice of the deficiencies, errors of law were not corrected and are present in connection with the ZBA's decisions, and the failure of the applicants Eco-Site and T-Mobile (hereinafter, collectively, "**the Applicants**") to meet their burden of proof and persuasion on several key elements. Further, the decision of the ZBA goes against the clear weight of the evidence presented. While the ZBA, sitting in a quasi-judicial capacity, may credit evidence as it sees fit, it may not ignore clear elements of statutory and regulatory law, look past total failures of proof on key elements of an application, or ignore marked imbalances of evidence. Finally, it appears that the ZBA, in rendering its decisions without discussion of the legal elements, the available evidence pertaining to same, and in accepting the City's clearly erroneous legal positions, failed to consider the evidence giving rise to due process failures. For these reasons, the Abutters respectfully submits that the ZBA's decisions of February 14, 2018 were unreasonable and unlawful, and request that the ZBA rehear the above-referenced matters to reconsider important issues it overlooked or misapprehended.

II. Factual and Procedural History

2. On October 18, 2017 the Applicants filed an Application for a Variance to Table 19A of the Rochester City Zoning Ordinance for exceeding the maximum building height in the Agricultural Zone and an Application for a Special Exception for the construction of a wireless communication facility (collectively, "**the Applications**").

3. The Applications seek permission to site a wireless communication facility at 144 Meaderboro Road in Rochester, NH, also denoted as map and lot number 0232-0016-0003 on the City of Rochester's tax maps ("**the Property**"). As proposed, the wireless communication facility (hereinafter, "**the Cell Tower**") would be 165 feet tall, and "disguised" by faux-pine branches. The Cell Tower would loom over the existing tree cover by at least 80 feet.

4. If built, the Cell Tower could be expanded as a matter of right as much as twenty (20) feet. Consistent with Section 6901 of the federal Middle Class Tax Relief and Jobs Creation Act of 2012, the Cell Tower can be extended another twenty feet without permission of the Planning Board or ZBA. Instead, the Applicants would be able to extend the height of the Cell Tower as a matter of right, only needing a building permit.

5. As proposed, the Cell Tower is extremely intrusive to neighboring properties, being at least twenty feet (and possibly forty feet, if extended) taller than a proposed wireless communication facility rejected by the ZBA on the same lot in 2014.

6. The proposed Cell Tower would also be visible from the neighboring towns of Farmington and Strafford, owing to its proximity to the municipal borders.

7. The Cell Tower will necessarily need infrastructure servicing the facility. In addition to electricity, the Cell Tower will also require an access road and other supporting infrastructure.

8. The necessary infrastructure will run through known wetlands on the Property.

9. The Application contained several exhibits supporting the relief sought. These included a radio frequency propagation study ("**the Propagation Study**") and an affidavit from a site selection specialist retained by the Applicants ("**the Site Selection Study**").

10. The Propagation Study contained no analysis of competing prospective sites or different tower heights. It provided no analysis why, from a radio frequency propagation perspective, a tower sited in Rochester's General Industrial Zoning District could not meet the Applicant's needs.

11. The Site Selection Study indicated that local landowners were contacted in the area where the Applicants were seeking to place a wireless communication facility. These landowners were contacted to develop possible alternate sites of the Cell Tower. The Site Selection Study candidly admitted that several polled landowners indicated interest in having a wireless communication facility

sited on their property. The Site Selection Study did not, however, indicate why such potential siting alternatives were rejected. Instead, the Site Selection Report baldly stated that the Property represented the best alternative, without revealing any basis for such opinion.

12. Upon receiving notice of the Application, the Abutters engaged counsel. The Abutters, through counsel, sent the ZBA a clear letter dated November 6, 2017 underscoring the need to meet certain legal obligations implicated by the Application and advising the ZBA of particular aspects of the Application that presented unique issues that should be explored. Other Abutters Michael Clauss and Andrea Veal sent an additional letter setting out their comments.

13. Given the proposed Cell Tower's proximity to the municipal border and several historically sensitive properties and locations, the Abutters reminded the Rochester Planning Department and the ZBA that the Application triggered the regional notification requirement under RSA 12-K:7. The notification requirement necessitated notice to the nearby Town of Farmington and certain publishing requirements. Given the proximity of the Cell Tower to the municipal border, impacted citizens from the Town of Farmington had a right to comment on the application. See, RSA 12-K:7.

14. The Abutter's November 6, 2018 letter also advised the ZBA of the importance of investigating certain elements of the Application and the need for proof on certain elements of the application for a special exception, especially the burden on the Applicants to establish that the proposed Cell Tower could not be located at any other, less intrusive prospective site, nor could it meet the Applicants' needs if sited in Rochester's General Industrial District, where a wireless communication facility could be had as a matter of right.

15. The Abutters' November 6, 2017 letter also advised the Board of a nearby prospective site that was far less intrusive and had the support of the neighborhood. This site was within the purported "search ring" used by the Applicants to focus their search for properties that would tend to address their alleged coverage gap. The Abutters underscored the importance of considering this location given

Rochester's Special Exception standard requiring the Applicants to furnish proof that the coverage needs could not be met on any prospective facility.

16. The Applicants were copied on the Abutters' November 6, 2017 letter, and all other correspondence submitted to the ZBA, Planning Department, and the City of Rochester by Abutter's counsel.

17. On November 9, 2017 a public hearing was held at which the board went into closed session for "legal counsel" and came back to request an independent radio frequency analysis to be paid for by the Applicants. No further arguments on either side were heard that night, nor were any of the Abutters' suggestions discussed or observed.

18. The Abutters sent a second letter to the Planning Department (asking that the letter be made a part of the certified record) on November 13, 2017. As with the November 6, 2017 letter, this letter was copied to the Applicants.

19. Like the November 6, 2017 letter, this letter again advised the ZBA of the peculiar nature of the Application given the ready availability of alternate prospective sites. The November 13, 2017 letter reminded the ZBA of the important procedural necessities of this case. No response was received by the Abutters to either their November 13, 2017 letter nor their call to the Rochester Department of Building, Zoning & Licensing on November 10, 2017 on the same topic.

20. On December 13, 2017, the public hearing on the matter was postponed at the request of the Applicants because only four voting members of the ZBA would have been present at the hearing.

21. In light of the postponement, the Abutters sent an *additional* letter to the ZBA dated December 15, 2017, directed to the Rochester Department of Building, Zoning & Licensing, *again* encouraging the ZBA to implement the Abutters' various procedural recommendations. This letter went a step further than the previous letters, expressly advising the ZBA of the various special exception

elements under the City of Rochester Wireless Communications Facility ordinance, explaining why certain issues were critical for the ZBA's consideration of the Application. This letter was also copied to the Applicants. Nothing was received in response to this letter, nor does it appear that the ZBA implemented or even considered the Abutters December 15, 2017 letter.

22. On January 10, 2018, the public hearing on the matter began, and the chairperson announced that only Rochester residents would be allowed to speak. The hearing began, but when Mr. Spector was called in to work, acting chair Bob Gates reminded the Applicants that there were now only four voting members, and so the Applicants once again requested a postponement.

23. On February 14, 2018, the public hearing on the matter began again. The ZBA again limited all public comments to residents of Rochester.

24. The Applicants' presentation, while professional, contained little additional evidence beyond what was furnished in connection with the Applications. In addition to a summation of the Propagation Study and the Site Selection Study, the Applicants provided testimony from a witness who discussed the safety of the radio frequency emanating from the Cell Tower, and an appraiser who provided his opinion that the proposed Cell Tower would have no effect on property values. The closest comparable provided by the appraiser, however, was a property with a visible tower located 1,000 feet away from the nearest home. The appraiser used one comparable for a property within 300 feet of a tower, but the tower was obscured from that particular comparable.

25. Despite express notice of the significant issues presented by the Applications articulated in the Abutters' letters, the Applicants' presentation contained no evidence concerning the suitability of alternate sites, including the site subject to an existing ground lease for siting a wireless communication facility. Similarly, the Applicants furnished no evidence why the other prospective sites presented by landowners who had responded positively to the Site Selection Specialist's inquiries were inappropriate.

Finally, the Applicants provided no evidence on why a Tower within the General Industrial Zoning District would not suit the Applicants' needs.

26. The closest the Applicant came to approaching such information was a statement from counsel that the Applicants could not meet their coverage needs on their existing five towers within City limits.

27. This bald statement falls outrageously short of meeting the Rochester's special exception criteria. Clearly, the Applicants do not have any coverage needs on or near their existing towers within the City: if their needs could be addressed from their existing infrastructure, no application would be necessary. The salient question under Rochester's special exception criteria is not limited to an Applicant's existing inventory of cell towers, but rather any prospective facilities.

28. Members of the public residing within Rochester were thereafter allowed to speak, limited to five (5) minutes apiece. Counsel for the abutters discussed the importance of the alternate prospective towers, and the Applicants' failure to furnish any proof in connection with same.

29. The commenting public, uniformly and without exception, spoke out against the Applications. The comments were cogent, emotional, and tied to the Applications. Not a single member of the public spoke in favor of the Applications. Among other topics thoroughly discussed by the public, speakers discussed at length how the Applications contravened the spirit and intent of the zoning ordinance and Master Plan, and the effect the proposed Cell Tower would have on the area's aesthetics. Testimony was also heard on actual instance of diminution in property value simply from the Applications, much less the construction of the proposed Cell Tower. Included herewith are two letters furnished by local relators describing the actual effect that the Application alone had on marketability.²

² The Abutters acknowledge that these letters were not furnished to the ZBA in connection with the February 14, 2018 hearing. At that hearing, however, the Applicants furnished their appraisal report for the first time, denying the Abutters any opportunity to obtain rebuttal materials.

30. After closing the public portion of the hearing, the ZBA voted unanimously to approve the Special Exception with no discussion of the elements of proof necessary to sustain the special exception. The ZBA thereafter dismissed the request for a Variance based on the City's representative, Jim Grant, who claimed that the building height variance does not apply to a wireless communications facility because a 165 foot high tower is considered "equipment", and that the City could not locate Table 20-A, referenced in Rochester's Zoning Ordinance at Section 42.22(c)(14)(C) as setting forth the various physical criteria regulating wireless communication facilities in Rochester.

III. Legal Argument

A. The ZBA should grant a rehearing as the decisions of the ZBA are unlawful and unreasonable.

31. The Abutters respectfully request that the ZBA rehear the Applications given that the ZBA's decisions, in light of the procedure employed and the paucity (or outright absence) of evidence on critical elements necessary to carry the Applications, render the decisions unlawful and unreasonable.

i. The ZBA's procedure violates RSA 12-K:7

32. The ZBA must rehear this matter, as it seems to have failed to implement the necessary notification and comment procedure set forth in RSA 12-K:7. In light of this procedural defect, a rehearing must be granted. See, NH Practice, Land Use Planning and Zoning § 21.18 (2017) (even a "technical error" meets requirement of rehearing). Here, especially where the ZBA was on express notice of its notification by virtue of the Abutters November 6, 2017 letter, it failed to implement the required regional notification procedures under RSA 12-K:7.

33. New Hampshire RSA 12-K:7 provides for regional notification to any municipality within 20 miles of a visible tower. See, RSA 12-K:7(I). This statute also requires public notification be run in a local newspaper such that citizens of the abutting Town can be notified of the application for a new cell tower. Id. at (I)(b).

34. The statute requires that residents of affected municipalities shall be permitted to comment at any public hearing related to the application. Id. at (III).

35. Here, the procedure employed by the ZBA clearly violated RSA 12-K:7. Even after the Abutters brought the notification requirement to the ZBA's attention, from the face of the Application it appears that no regional notification was implemented, and residents of Farmington (who were in attendance and wished to speak) were denied an opportunity to comment.

36. This procedural defect is significant; members of the public who were statutorily entitled to notice were denied same, and those who nonetheless became aware of the Applications were nonetheless denied an opportunity to speak in violation of RSA 12-K:7(III). Rehearing must be granted to avoid and address Constitutional due process violations and core statutory procedure defects.

ii. The decision is unlawful given the utter absence of evidence on core elements of the special exception.

37. The ZBA must rehear this matter given the absence of any evidence on certain necessary elements of the special exception.

38. Under Rochester's Wireless Communication Facility ordinance, an applicant must establish several elements in order to be entitled to a special exception permitting a wireless communication facility. See, Rochester Zoning Ordinance (hereinafter "**the Ordinance**") at Section 42.22(b)(base criteria); Section 42.22(c)(14)(special criteria pertaining to wireless communication facilities). The applicant bears the burden of furnishing evidence establishing that it meets all applicable criteria. See, Ordinance at Section 42.22(a)(5).

39. Applicants bear a heavy burden when proposing a new wireless communication facility. In order to meet the criteria for a special exception permitting a cell tower, the applicant must establish that its needs cannot be met:

“a) within a zoning district where these facilities are permitted by right; nor b) on any existing or approved antenna support structure in the City of Rochester; nor c) on any prospective alternative tower structure in the City of Rochester[.]”

See, Ordinance at Section 42.22 (c)(14)(A).

40. Beyond the foregoing, any proposed wireless communication facility must meet all specifications set forth on Table 20-A, entitled “Commercial Wireless Facilities Standards.” See, Ordinance at 42.22(c)(14)(C).

41. Wireless communication facilities are permitted by right in Rochester’s General Industrial District. The closest lots within Rochester’s General Industrial District are less than two (2) miles from the search ring contemplated by the Applicants.

42. The Applicants utterly failed to enter any evidence to carry their burden on base special exception criteria under Section 42.22(b) of the Ordinance and the criteria found at Section 42.22(c)(14)(A) attendant to wireless communication facilities. The Applicant presented no evidence on why existing structures would be unsuitable pursuant to the criteria set forth in Section 42.22(c)(14)(a)(i-iv). The Applicant provided no evidence why the nearby prospective tower would not address the Applicant’s coverage needs, nor why other landowners expressing interest in the area were not suitable. Finally, the Applicants presented no evidence why a tower sited within the nearby General Industrial Zoning District could not meet their requirements.

43. The foregoing does not present a close call: the Applicants failed to present evidence on any of the above referenced elements. That is, this is not a matter where the ZBA heard conflicting evidence and resolved such conflicts in a particular manner. Instead, the Applicant utterly failed to enter evidence on these necessary points.

44. This dearth of evidence is fatal to the Application for a special exception, and underscores the unlawfulness of the ZBA’s decision in this regard. See, e.g., McKibbin v. City of Leb., 149 N.H. 59, 61(2003) (“In applying for a special exception, the applicant has the burden of presenting

sufficient evidence to support a favorable finding on each of the requirements for a special exception.”) Absent any such evidence, the ZBA’s decision must be denied, and the matter reheard.

iii. *The ZBA’s decision to dismiss the variance application is unlawful in light of its interpretation that the proposed Cell Tower is “equipment” rather than a structure subject to the district’s height restrictions*

45. The ZBA’s acceptance of the City’s opinion that the proposed Cell tower was “equipment” and thus not subject to the Agricultural District’s maximum height has no basis in the Ordinance and is unlawful.

46. The Ordinance’s Table 19-A, which dictates maximum heights in various districts, provides that “buildings” used for “all other purposes” aside from single- or two-family dwellings may not exceed 35 feet in height. See, Ordinance at Table 19-A.

47. The Ordinance defines “Building” as “[a] structure that provides or can provide ... shelter or enclosure for ... equipment, or other personal property and which is fully enclosed and protected from the weather[.]” See, Ordinance at Section 42.2(b)(35)

48. In defining “Building”, the Ordinance also refers the reader to “Structure” for guidance on what constitutes a Building. Structure is defined simply as “[a] combination of materials that form a construction for use, occupancy, or ornamentation whether installed on, above, or below the surface of land or water.” See, Ordinance at Section 42.2(b)(252).

49. The Ordinance provides no definition for “equipment”, nor do *any* provisions of the Ordinance suggest any height exemption for “equipment”. Instead, certain enumerated uses (but not cell towers) are exempted from the height restriction *up to 100 feet*. See, Ordinance at Section 42.19(b)(3).

50. Simply put, there is no basis for the ZBA's distinction that the proposed wireless communication facility is "equipment" rather than a "building." The proposed Cell Tower is clearly a building in that it houses equipment, both internally and externally, and is fully enclosed.

51. Even ignoring the foregoing, the height exemption suggested by the City and adopted by the ZBA simply does not exist.

52. In sum, the dismissal of the variance application is unlawful in that it contravenes the plain terms of the Ordinance. A full rehearing must be heard, as the Applicants must establish their entitlement to a variance.

iv. *The ZBA's decisions are unreasonable and against the weight of the evidence.*

53. As set forth above, the Board's procedures and decision in this matter were unreasonable. The ZBA ignored the great weight of the evidence presented by numerous abutters and interested parties, and granted a special exception without discussion, and irrespective of the Applicants' failure to furnish evidence on necessary elements of the special exception.

54. The ZBA also appears not to have attempted to verify or understand portions of the Ordinance: Section 42.22(c)(14)(C) clearly refers the reader to Table 20-A as setting out the standards for wireless communications facility. The City advised the ZBA "when reviewing 42.22.c.14.c the section and Table do not exist [sic]." This is clearly an untrue statement: the section, at minimum, exists. Rather than attempting to verify a clearly erroneous recommendation from the City, the ZBA accepted the foregoing recommendation wholesale and dismissed the variance.

55. This is an unreasonable decision. As a threshold matter, it is incumbent upon the ZBA to investigate and ensure it has the municipality's ordinances such that it can properly administer same. Further, if the table of wireless communication facility criteria is missing, the ordinance defaults to its standard height provisions. If a specific regulation is missing, it does not render a use completely

unregulated: instead, the default regulation applies. This is consistent with the Ordinance's severability provision, Section 42.1(f), which provides that if any body determines any provision of the Ordinance is invalid, "the finding shall not invalidate any other provision of this chapter. Those other provisions shall remain in full force without any other action required." This severability clause is directly implicated where, as the City Council apparently determined here, the table is rendered invalid because the City cannot locate it.

v. The ZBA's decision is unlawful and unreasonable as the ZBA did not consider the evidence.

56. The process employed by the ZBA violated the due process rights of the Abutters. In voting on the Application without discussion, considering of the elements necessary to carry the Application, considering the evidence (or lack thereof) presented at the hearings, and accepting the City's erroneous legal conclusions and posture on the Applications without question, the ZBA failed to consider the evidence.

57. The foregoing failures present due process violations prejudicing the Abutters and other Rochester residents. A rehearing should be granted such that the ZBA can carefully consider the evidence, giving ample time for comments from all interest holders, such that the due process rights of all interest holders may be observed.

V. Conclusion

58. In sum, the Abutters respectfully request that the ZBA grant this motion and rehear this matter in a way that complies with applicable law, implements the correct procedure, and requires the Applicants to meeting their burdens. Beyond the foregoing, the Abutters respectfully request that the ZBA deny the Applications given the intrusive nature of the proposed Cell Tower, its disharmony with the area and the spirit of the Ordinance and Master Plan, and for failure to meet the various requirements of the special exception and variance sought by the Applicants.


Respectfully Submitted,

THE ABUTTERS

By and Through Their Attorneys,

DONAHUE, TUCKER AND CIANDELLA, PLLC

3/15/18
Date



Christopher T. Hilson, Esq.
NHBA # 17116
Donahue, Tucker and Ciandella, PLLC
16 Windsor Lane
Exeter, NH 03833
(603)778-0686
chilson@dtclawyers.com

RE/MAX ON THE MOVE
43 WATER STREET
EXETER, NEW HAMPSHIRE 03833

March 12, 2018

To Whom It May Concern:

In May of 2017 I represented Nick and Andrea Pellman in the sale of their property located at 136 Meaderboro Road in Rochester, NH.

Well into the transaction one of the abutters, Matt Scruton, notified the Pellman's that he was negotiating with a cell company to construct a cell tower on his property. The tower would be visible from the Pellman's property.

I disclosed this information to the buyer's agent. The buyers had a real concern as to the impact this would have on a future resale, the unknowns regarding the location of the structure and how that would hinder the tranquil setting that was a selling factor to the buyers and property.

The buyers came back requesting a \$5,000.00 price reduction ...the other option was voiding the contract. I spoke with REALTORS® and several appraisers throughout New Hampshire to see if there was any data regarding the impact a cell tower has had when erected in residential neighborhoods. Unfortunately, there were no statistics and to the best of my knowledge we were the first to experience this.

The Pellman's agreed to the concession ...as I said we were well into the transaction and needed to proceed to close. The proposed cell tower was the only factor contributing to the price reduction.

I have been contacted by appraisers since we closed on the Meaderboro property who asked "how did I value the damages". The Pellman's simply consented to the buyer's request.

Regards,

Marion Cheney, Managing Broker

ABR, GRI, SRES, CRS, PMN

2015 NH REALTOR® of The Year

Chair Great Dover Chamber of Commerce

2018 President Southern NH Women's Council REALTORS®

National Association of REALTORS® State and Local Policy Issues Committee

RE/MAX ON THE MOVE

43 Water Street

Exeter, NH 03833

(O) 603-777-1500 ext. 216

(M) 603-312-3137

macheney@comcast.net marioncheney.com

Janis Foster
15 Shaw Circle
New Castle, NH 03854
Tate and Foss Sotheby's International Realty, Rye, NH
License No 010157

March 7, 2018

To the Rochester Zoning Board:

I have been a realtor since 1995 and have experienced the market in New Hampshire in a variety of economic times.

In my experience, any property with a "red flag" - whether it be a wet basement, an ugly view, or in this case an abutting cell phone tower- gives buyers pause, reduces the pool of people interested in the property, and eventually leads to a devaluing of the property.

In the case of the sale of 13⁶~~8~~ Meaderboro Road (which abuts the proposed cell tower at 144 Meaderboro Road) in May of 2017, there was a contracted price, then news of a cell tower possibly being proposed next door, then there was a price re-negotiation based solely on the possibility of the cell tower, followed by a lowering in price by \$5,000. The only way any professional can interpret that information is that the possibility of a cell tower next door damaged the property's value.

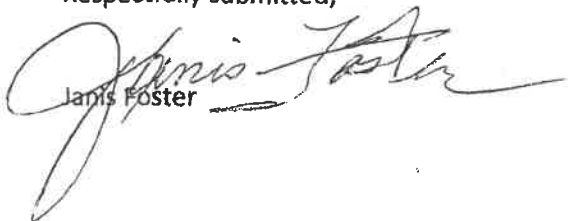
Appraisers can make general statements about cell towers that are situated far away from people's homes not harming property values, but general statements cannot compete with the facts in this situation, which are that the potential of a cell tower already harmed one property value in this neighborhood.

The appraiser's report submitted by Mark Correnti does not address the sale of 13⁶~~8~~ Meaderboro Road, because Mr. Correnti knows that the value of that home was absolutely lowered by the potential of a cell tower being built on the abutting property.

Furthermore, Mr. Correnti's "comparable" sales are not comparable at all to the situation in which the properties abutting 144 Meaderboro Road would find themselves. The proposed tower is 435 feet from abutting properties' lot lines (which translates to approximately 500 feet away from two abutting HOMES), while Mr. Correnti's "comparable" homes are 2,100 feet, 1,200 feet, and 1,000 feet away from cell towers (his sixth example is a home 300 feet from a cell tower, but the tower cannot be seen from the property, so again, this is not comparable to what the abutters of 144 Meaderboro Road would experience).

The proposed tower is so close to neighboring homes that in my opinion it would devalue them, and there is no denying that 13⁶~~8~~ Meaderboro Road already experienced a loss in value at the prospect of a cell tower next door.

Respectfully submitted,


Janis Foster