

STATE OF NEW YORK
SUPREME COURT : COUNTY OF NIAGARA

In the Matter of the Application of the SIERRA CLUB;
DARLENE BULLSOVER; SYLVIU DAN, JR.; and
DEBORAH GONDEK,

Petitioners,

For a Judgment Pursuant to Article 78 of the
New York Civil Practice Laws and Rules

-vs-

CITY OF NORTH TONAWANDA; CITY OF
NORTH TONAWANDA PLANNING BOARD;
FORTISTAR NORTH TONAWANDA LLC; and
DIGIHOST INTERNATIONAL INC.

Respondents.

Index No. _____

VERIFIED PETITION

Petitioners by their attorneys, LIPPES & LIPPES, Richard J. Lippes, of
counsel, respectfully alleges as follows:

I. INTRODUCTION

1. This proceeding challenges the Respondents’ proposed crypto mining
(bitcoin mining) proposal next to the Fortistar North Tonawanda, LLC (hereinafter
cited as “Fortistar”) natural gas and steam power plant at 1070 Erie Avenue, in the
City of North Tonawanda, County of Niagara, State of New York. Petitioners
claim that the City of North Tonawanda and North Tonawanda Planning Board
violated various state and local laws in approving the bitcoin facility, including
North Tonawanda’s Zoning Ordinance, the New York State Environmental Quality

Review Act, Environmental Conservation Law § 8-0101 et. seq. [hereinafter cited as “SEQRA”] and the regulations promulgated pursuant thereto, § 239-M of the General Municipal Law, and the Climate Leadership and Community Protection Act. For these reasons, this Petition requests that the determinations made by the City of North Tonawanda Planning Board be voided, and an injunction entered until such time as all laws of the State of New York and ordinances of the City of North Tonawanda are fully complied with.

II. PARTIES

2. Petitioner SIERRA CLUB is a national grassroots not-for-profit conservation corporation formed in 1892 under the laws of the State of California. Its purposes include practicing and promoting the responsible use of the earth’s eco systems and resources, and protecting and restoring the quality of the natural and human environment, including the air and waters of the United States.

The Sierra Club has approximately 540,000 members nationwide, with approximately 54,000 members in New York State including members in Niagara County and North Tonawanda who will be adversely affected by the bitcoin data mining operation. These members, whose conservation, aesthetic and recreational interests will be injured by the environmental damage that will be caused by the bitcoin data mining.

3. Petitioner DARLENE BULLSOVER owns her home at 631 Walck Road in North Tonawanda, New York, which is nearby the site of the proposed bitcoin mining facility. She is concerned about the increased air pollution, noise pollution, greenhouse gas omissions, and increased traffic that will impact her quality of life and conversation interests.

4. Petitioner SYLVIU DAN, JR. owns and resides at 516 Meadow Drive, North Tonawanda, New York, 14120, across the street from the proposed bitcoin mining facility. He is concerned about the increased air pollution, noise pollution, greenhouse gas omissions, and increased traffic that will impact his quality of life and conversation interests.

5. Petitioner DEBORAH GONDEK owns and resides at 257 Brantwood Drive, North Tonawanda, New York 14120, nearby the site of the proposed bitcoin mining facility. She is concerned about the increased air pollution, noise pollution, greenhouse gas omissions, and increased traffic that will impact her quality of life and conversation interests.

6. Respondent the CITY OF NORTH TONAWANDA and its PLANNING BOARD, located at 216 Payne Avenue, City of North Tonawanda and State of New York, is the agency responsible for approving the bitcoin mining facility, and as such, is also responsible for compliance with both the procedures and substance of New York State law as previously indicated.

7. Respondent FORTISTAR NORTH TONAWANDA LLC, located at 1070 Erie Avenue, North Tonawanda, New York 14120, is the owner of the energy generating plant, whose electrical generation will be used exclusively to power the bitcoin mining facility. As such, they are made a Respondent in the instant proceeding in order to effectuate the relief requested in this Petition.

8. Respondent DIGIHOST INTERNATIONAL INC located at 127 E. 9th Street, Suite 901, Los Angeles, California (hereinafter cited as “Digihost”), is the proposed developer of the bitcoin mining facility. As such, they are made a Respondent in the instant proceeding in order to effectuate the relief requested in this Petition.

III. FACTS

9. The parcel of land upon which the bitcoin mining facility is proposed to be built is at 1070 Erie Avenue in the City of North Tonawanda, New York. The property is currently owned by Fortistar, and is a 13.7 acres parcel zoned as M-1, light industrial uses. The M-1 zone does not expressly list a bitcoin mining datacenter as an allowable or accessory use in the City of North Tonawanda zoning ordinance.

10. The site is contiguous to a residential zone, where the Petitioners reside, as well as a commercial district.

11. Fortistar intends to sell the property to cryptocurrency mining company Digihost International Inc. On June 17, 2021, Fortistar filed a petition with the Public Service Commission seeking approval of the transfer of its Fortistar North Tonawanda facility to Digihost International. The Public Service Commission has not yet determined whether or not to approve the purchase by Digihost.

12. The property is currently operating as a natural gas and steam fire power plant. The plant, while operational, is currently operated significantly below capacity, generally around 10 percent of its energy generation capacity and permitted approval, and has been used at this level since around 1994.

13. Digihost intends to operate its bitcoin mining center 24 hours per day, 365 days per year. Specifically, Digihost will be a data center for bitcoin mining, utilizing shipping containers to house the computers. The site plan shows a phase I installation including six 40 foot shipping containers utilized for switch gears and sixteen 40 foot containers for computer equipment. The units will be stacked two units high and placed in a set of two with a connecting staircase system. Phase II will consist of 12 additional 40 foot storage containers, again stacked two high.

14. Each container will house a few hundred computers that will be fully self-contained and ventilated for cooling. The shipping container will be placed on concrete pads installed on a grassy area adjacent to the power plant facility.

15. In order to mine for bitcoins, all of the computers independently and together search for certain bitcoins using algorithms.

16. In order to supply the energy needed for the hundreds of computers running 24 hours a day, 365 days a year, the Fortistar plant, instead of operating at approximately 10 percent of its capacity, will now operate at full capacity, which will require 30 times the carbon dioxide discharge than present uses.

17. Besides the huge amount of greenhouse gases that will be discharged if the bitcoin mining facility goes into effect, the operation will require the intake of 500,000 gallons of North Tonawanda's public water supply from the North Tonawanda Wastewater Treatment Plant, and will need to discharge 100,000 gallons of superheated water per day back to the wastewater treatment plant which will further discharge the superheated water into Tonawanda Creek.

18. The site of the bitcoin facility is located immediately adjacent to a federal wetland No. TF01ED and to the "check zone" for New York State Wetland TE-39. Due to the location of the intended placement of the shipping containers, approximate to the federal and state wetland check zone, the Planning Board found that the potential effect on the wetlands will provide a moderate impact to surface water and suggested that a wetland delineation may need to be completed on the property. No wetland delineation has been prepared either prior to the approval of the project by the North Tonawanda Planning Board or after such approval.

19. For purposes of SEQRA, the Planning Board designated itself as lead agency for SEQRA compliance. On July 12, 2021, Digihost submitted a request to the Planning Board for review of the project, but only to review the construction of the concrete slabs for shipping containers.

20. On July 13, 2021, the Planning Board referred the project to the Niagara County Planning Board pursuant to § 239-M of the General Municipal Law. The only environmental document submitted with this referral was a short form Environmental Assessment Form.

21. On July 19, 2021, the County Planning Board approved the project with two conditions: (1) A request that North Tonawanda confirm that the bitcoin mining project is an allowable use in the M-1 zoning district, and (2) that the City Fire Department needed to conduct a full fire safety review.

22. On August 12, 2021, the Planning Board received a SEQRA Full Environmental Assessment Form, which supplemented and provided further information than the Short Form Environmental Assessment Form that was submitted with the referral to the County Planning Board. The Full Environmental Assessment Form was not made publicly available for review, and further, was never submitted to the County Planning Board for their review.

23. On September 8, 2021, the City of North Tonawanda issued a Negative Declaration indicating that there will be no significant environmental

consequences ensuing from the project and therefore, an Environmental Impact Statement need not be drafted. They also identified five moderate impacts including potential impacts on New York State Wetland TE-39 and negative impacts on air quality due to the increase of CO₂ and N₂O emissions stemming from the increased plant operation.

24. They also determined that the data mining facility was an accessory use of the Fortistar Power Generating Plant, and therefore, was allowed under the M-1 zoning district.

IV. VIOLATION OF THE CITY OF NORTH TONAWANDA'S ZONING ORDINANCE

25. As previously indicated, all parties agree that the M-1 zoning district where the proposed bitcoin mining facility will be located, does not explicitly allow for the data mining facility either directly, or by the list of accessory uses indicated as appropriate within the M-1 zoning district.

26. However, based upon the determination of the City of North Tonawanda Attorney, they determined that the data mining facility was allowed by the zoning code as an accessory use.

27. Section 103.20 of the North Tonawanda Zoning Code indicates that an accessory use is defined as “A use customarily incidental and subordinate to the principal use or building and located on the same lot with such principal use or building.”

28. Section 103-5(B) of the North Tonawanda Zoning Code indicates:

“(B) Interpretation: when uses are excluded from a use group.

(1) Listed uses. When a use is first included in any use group, such use shall be interpreted as being excluded from any use group with a lower number.

(2) Uses not listed. In the case of a use which is not listed in any zoning district, such use shall be interpreted as being excluded from all use groups until this ordinance has been amended, listing such use as a permitted use in the appropriate zoning district.”

A data mining facility is not listed as allowed in any zoning district, and the zoning ordinance has not been amended to include data mining in any zoning district.

29. Therefore, in order to be considered an accessory use, the data center must meet three qualifications: that it is a customary use next to a energy generation facility; it is subordinate to the principal use of the energy facility, and it is incidental to the principal use of energy production.

30. The bitcoin mining facility does not meet any of the three requirements to be an accessory use. In fact, the bitcoin mining operation would become the principal use of the facility, with the power plant being only incidental to the data mining facility, since the power plant will only be used to supply energy to the data mining center. Moreover, data mining facilities are new technology,

and very few of them exist in the United States, and therefore, they are not customary to land owned by a power generation facilities.

31. Finally, the data mining facility will not be incidental to the power generating facility, and in fact, the power generating facility will become incidental to the data mining facility since the power generating facility will only be used to power the data mining computers for personal profit of the Digihost facility.

32. Therefore, since the mining facility is not an accessory use to the power generating facility, and not an allowed use within the M-1 zoning district, therefore, the approval of this bitcoin mining facility was done in violation of the City of North Tonawanda Zoning Code.

V. VIOLATION OF THE NEW YORK STATE QUALITY REVIEW ACT

33. The responsibilities of an agency pursuant to SEQRA are specified in the regulations promulgated pursuant to SEQRA, and are contained at 6 N.Y.C.R.R. § 617.

34. According to the regulations promulgated pursuant to SEQRA:

The basic purpose of SEQR is to incorporate the consideration of environmental factors into the existing planning, review and decision-making processes of state, regional and local government agencies at the earliest possible time. To accomplish this goal, SEQR requires that all agencies determine whether the actions they directly undertake, fund or approve may have a significant impact on the environment and, if it is determined that the action may have a significant adverse

impact, prepare or request an environmental impact statement.

6 NYCRR §617.1(c).

35. Further, the regulations indicate that:

In adopting SEQR, it was the legislature's intention that all agencies conduct their affairs with an awareness that they are stewards of the air, water, land and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations.

6 NYCRR § 617.1(b)

36. The regulations contained at 6 NYCRR § 617.7 indicate that an EIS must be prepared if the proposed action “may include the potential for at least one significant adverse environmental impact.” 6 NYCRR § 617.7(a)(1) [emphasis added].

37. Conversely, to determine that an EIS will not be required for an action, “the lead agency must determine either that there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant.” 6 NYCRR § 61.7.7(a)(2).

38. In determining whether there may be significant adverse environmental impacts, the regulations at 6 NYCRR § 617.7 list the following factors, among others, which if they exist, would require the preparation of an Environmental Impact Statement [hereinafter cited as “EIS”]:

- (i) a substantial adverse change in existing air quality, ground or surface water quality or quantity, traffic or noise levels;...

...

- (iv) The creation of a material conflict with a community's current plans or goals as officially approved or adopted;
 - (v) The impairment of the character or quality of important historical, archeological, architectural, or aesthetic resources or of existing community or neighborhood character;
 - (vi) a major change in the use of either the quantity or type of energy;
 - (vii) the creation of a hazard to human health;
 - (viii) A substantial change in the use, or intensity of use, of land including agricultural, open space or recreational resources, or in its capacity to support existing uses;
- ...
- (xi) Changes in two or more elements of the environment, no one of which have a significant impact on the environment, but when considered together result in a substantial adverse impact on the environment;"

6 NYCRR § 617.7(c)(1).

39. An Environmental Impact Statement provides the lead agency with all of the appropriate information concerning the effects of the project. Moreover, in considering whether to prepare an Environmental Impact Statement, the lead agency must consider not only issues involved with the specific action that the lead agency is being asked to take, but all potential significantly adverse consequences

of the project including those issues or permits that may be issued by other agencies. Just as surely, the EIS provides the public with this information, allowing them to knowledgeably provide input and comment on the environmental review process.

40. The lead agency is required to apply a “hard look standard” in fulfilling its SEQRA responsibilities, which requires an agency to:

- (1) Identify all areas of environmental concern; and
- (2) Take a hard look at the environmental issues identified; and
- (3) Provide a written reasoned elaboration for the decisions that are made, including whether or not to do an environmental impact statement.

41. As previously indicated, the City of North Tonawanda issued a Negative Declaration determining that there will be no significant adverse environmental consequences to the bitcoin mining project. While they did find five moderate consequences, they still issued a Negative Declaration indicating that it was unnecessary to do an Environmental Impact Statement.

42. However, in issuing their Negative Declaration, they failed to identify certain environmental consequences, or to take a hard look at them. Therefore, for example, in the Full Environmental Assessment Form at D-2(g)(2)(ii), at page 6 of the Environmental Assessment Form, the Environmental Assessment Form asks “In addition to omissions that is calculated in the application, the project will

generate: _____ tons per year (short tons of carbon dioxide (CO₂) and _____ tons per year (short tons of nitrous oxide (N₂O) and will generate _____ tons per year (short form) of hazardous air pollutants (HAPs).

43. As to the amount of tons per year generated of carbon dioxide and nitrous oxide these two questions are answered: “permitted”. Concerning hazardous air pollutants, this was answered as “N/A”.

44. Apparently, the City of North Tonawanda Planning Board has taken the position that if a permit has been granted to Fortistar by the Department of Environmental Conservation, and Fortistar will operate within the parameters of that permit, that the Planning Board does not have to independently identify, take a hard look, and provide a reasoned elaboration concerning those issues.

45. However, the regulations do not allow a lead agency to defer a review of any potential adverse environmental consequences to another agency, whether an agency of the state or of the federal government.

46. Since the North Tonawanda Planning Board did not either identify or take a hard look at the production of CO₂ and N₂O or HAPs, due to the fact that the DEC had issued an air permit to Fortistar, the Planning Board violated SEQRA for this reason alone.

47. However, there were also a number of other violations of the SEQRA regulations. For further example, the requirement of a reasoned elaboration to

support the Negative Declaration was also violated, since the purported Planning Board's reasoned elaboration was largely conclusory and did not provide the appropriate information concerning all areas of environmental concern and the appropriate information to support the fact that all areas of environmental concern would not result in any significant adverse environmental consequences.

VI. THE PLANNING BOARD VIOLATED THE REQUIREMENTS OF § 239-M GENERAL MUNICIPAL LAW

48. In certain instances, the Planning Board was required to make a referral to the Niagara County Planning Commission for their recommendation as to whether or not approval should be given to a particular project.

49. In the instant proceeding, such a reference was made. However, § 239-M of the General Municipal Law, indicate what documents must be provided to the County Planning Commission for them to do an appropriate review.

50. However, while a referral was made to the Niagara County Planning Commission, the appropriate documents necessary to make such referral were not attached to the referral.

51. When a referral is made to the Niagara County Planning Commission, it must include a "full statement of such proposed action". At § 239-M(1)(c) the statute indicates:

(c) The term "full statement of such proposed action" shall mean all materials required by and submitted to the referring body as an application on a proposed action,

including a completed environmental assessment form and all other materials required by such referring body in order to make its determination of significance pursuant to the state environmental quality review act under article eight of the environmental conservation law and its implementing regulations....”

52. When the referral was made to the Niagara County Planning Commission by the North Tonawanda Planning Board, it appears that the only document submitted was a short Environmental Assessment Form.

53. However, there were a number of other documents before the North Tonawanda Planning Board in order for the Planning Board to make its determination under SEQRA. They included the Full Environmental Assessment Form , which was not submitted to the Niagara County Planning Commission since it was not prepared and received by the North Tonawanda Planning Board until approximately one month after the reference was made to the Niagara County Planning Commission. Similarly, the Amended Site Plan was not included, nor was the other application documents included.

54. Therefore, since the full statement of such proposed action was not referred to the Niagara County Planning Commission, the North Tonawanda Planning Board violated § 239-M of the General Municipal Law.

55. Since a referral along with all necessary documents to the Niagara County Planning Commission is a jurisdictional requirement, failure to make such

a referral with the full statement requires the voiding of the North Tonawanda approval of the project.

VII. APPROVAL OF THE BITCOIN DATA MINING PROPOSAL VIOLATES THE NEW YORK CLIMATE LEADERSHIP AND COMMUNITY PROTECTION ACT

56. On July 18, 2019, New York State passed the Climate Leadership and Community Protection Act. The Act set specific goals for reduction of carbon and other omissions, including specific requirements for electric generation. Overall, the Act requires 85 percent reduction in greenhouse gas emissions by 2050, with an interim target of 40 percent by 2030. The remaining 15 percent of omissions beyond the 85 percent reduction will be achieved by a limited offset program, which excludes electric generation facilities from such offset program.

57. The special requirements concerning electric generation facilities requires 70 percent of all of New York's electricity to come from renewable sources by 2030, and 100 percent zero omission generation by 2040. The Act also includes specific requirements to achieve these goals, including specific requirements for renewable energy facilities.

58. This should be compared to the fact that the Fortistar facility has operated infrequently over the last several years, only approximately 14 to 20 days each year since 2018. The power plant's annual omissions were 12,448 tons of CO2 for 2018, 9,245 tons of CO2 for 2019, and 10,981 tons of CO2 for 2020.

59. However, with the electrical generation for the bitcoin mining facility operating 24 hours a day, 365 days a year, the electric generation will be approximately 30 times its 2020 CO2 omissions, and therefore is directly contrary to the requirements and goals of the Climate Leadership and Community Protection Act.

60. Therefore, approval of the bitcoin mining facility is directly contrary to the Climate Leadership and Community Protection Act. Since the approval of the bitcoin mining facility is directly in violation of the requirements and goals of the Climate Leadership and Community Protection Act, such approval must be voided.

FOR A FIRST CAUSE OF ACTION:
VIOLATION OF NORTH TONAWANDA'S ZONING ORDINANCE

61. The allegations contained in paragraph "1" through "60" inclusive are hereby realleged as more fully set forth herein.

62. As previously, bitcoin data mining is not an allowed use in an M-1 district, and not listed as an accessory use.

63. Since the bitcoin mining facility will be neither customary to an electrical generation facility, or an accessory to the principal use, it is not an appropriate accessory use.

64. Indeed, the data mining facility will become the principal use, since the electrical generation facility will be used for producing electricity exclusively for the bitcoin data mining operation.

**FOR A SECOND CAUSE OF ACTION:
VIOLATION OF SEQRA**

65. The allegations contained in paragraph “1” through “64” inclusive are hereby realleged as more fully set forth herein.

66. Since the North Tonawanda Planning Board did not identify all essential significant negative environmental consequences, or take hard look at them, and further did not provide an appropriate reasonable elaboration of the Negative Declaration that they issued, the City of North Tonawanda Planning Board has violated the requirements of SEQRA.

67. Since the procedural and substantive requirements of SEQRA have been violated, it is respectfully submitted that this Court must void the approval of the data center, and issue an injunction.

**FOR A THIRD CAUSE OF ACTION:
VIOLATION OF § 239-M OF THE GENERAL MUNICIPAL LAW**

68. The allegations contained in paragraph “1” through “67” inclusive are hereby realleged as more fully set forth herein.

69. The City of North Tonawanda Planning Board was required to make a referral to the Niagara County Planning Commission along with a full statement of the project.

70. While the Planning Board made a referral to the Niagara County Planning Commission, it did not include a full statement of the record that was before the Planning Board, and therefore, violated § 239-M of the General Municipal Law.

71. Since compliance with § 239-M of the General Municipal Law is a jurisdictional requirement, the approval of the bitcoin mining facility must be voided and an injunction entered.

FOR A FOURTH CAUSE OF ACTION:
VIOLATION OF THE CLIMATE LEADERSHIP AND COMMUNITY
PROTECTION ACT

72. The allegations contained in paragraph “1” through “71” inclusive are hereby realleged as more fully set forth herein.

73. The recently passed Climate Leadership and Community Protection Act require significant reductions in greenhouse gases, including CO₂ and N₂O.

74. Since the approval of the data mining facility will not decrease the greenhouse gas submissions, but will in fact significantly increase the amount of greenhouse gas omissions, the City of North Tonawanda Planning Board has violated the Climate Leadership and Community Protection Act.

VIII. CONCLUSION

For the foregoing reasons, North Tonawanda and its Planning Board have violated various New York State laws and its own zoning ordinance. It is respectfully submitted that approval of the bitcoin mining facility must be voided, and an injunction requiring that no construction be undertaken for the bitcoin mining facility until such time as all laws of the State of New York and ordinances of the City of North Tonawanda are complied with, and an application is made to this Court to lift such injunction after such compliance.

DATED: Buffalo, New York
November 1, 2021

Yours etc.,



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