

At a Special Term of the New
York State Supreme Court,
Niagara County, at the Angelo
Delsignore Courthouse at 775
Third Street, Niagara Falls, New
York 14302, on the 2nd day of
March, 2022.

PRESENT: HON. FRANK A. SEDITA, III, J.S.C.
Justice Presiding

SUPREME COURT OF THE STATE OF NEW YORK
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 Law and Rules

vs.

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

Respondents.

ORDER

Index No.
E176242/2021

Petitioners Sierra Club, Darlene Bullsover, Sylviu Dan, Jr., and Deborah
Gondek ("Petitioners") having commenced this proceeding pursuant to CPLR Article 78
("Article 78 Petition"), and having moved for a preliminary injunction ("PI Motion"); and
Respondents the City of North Tonawanda and the City of North
Tonawanda Planning Board (together, the "City") having opposed the Article 78 Petition
and the PI Motion, and the City having moved to dismiss the Article 78 Petition; and

Respondents Fortistar North Tonawanda LLC ("FNT") and Digihost International, Inc. ("Digihost") having opposed the Article 78 Petition and the PI Motion, and FNT and Digihost having moved to dismiss the Article 78 Petition; and

Petitioners having opposed the City's motion to dismiss; and

Petitioners having opposed FNT and Digihost's motion to dismiss;

NOW, upon reading and filing Petitioners' Notice of Petition, dated November 1, 2021, Petitioners' Verified Petition, dated November 1, 2021, Petitioners' Amended Notice of Petition, dated November 11, 2021, and Petitioners' Amended Verified Petition, dated November 3, 2021, filed in support of the Article 78 Petition; and

Petitioners' Notice of Motion, dated December 1, 2021, and the affirmation of Richard Lippes, Esq., dated December 1, 2021, filed in support of the PI Motion; and the City's Notice of Motion, dated January 4, 2022, and the affirmation of Nicholas B. Robinson, Esq., dated January 4, 2022, with exhibits, filed in support of the City's motion to dismiss and in opposition to the PI Motion; and FNT and Digihost's Notice of Motion, dated January 5, 2022, the affidavit of William V. Rossi, Esq., sworn to January 5, 2022, with exhibits, the affidavit of Alec Amar, sworn to January 5, 2022, and the affidavit of Thomas Gesicki, sworn to January 5, 2022, filed in support of FNT and Digihost's motion to dismiss and in opposition to the PI Motion; and

After hearing Lippes & Lippes (Richard Lippes, Esq., of counsel), attorneys for Petitioners, Phillips Lytle, LLP (William V. Rossi, Esq., of counsel), attorneys for FNT and Digihost, and the Department of the City Attorney for the City of North Tonawanda (Nicholas B. Robinson, Esq., of counsel), attorneys for the City; and after due deliberation thereon and for the reasons stated in the decision of the Court made on the record of

proceedings held March 2, 2022, a complete transcript of which is attached as Exhibit A and incorporated as a part of this Order as though fully set forth herein, it is hereby

ORDERED that Petitioners' motion for a preliminary injunction is
DENIED; and it is further

ORDERED that FNT, Digihost, and the City's respective motions to dismiss
are GRANTED, and it is further

ORDERED that the Article 78 Petition is DISMISSED, with prejudice.

Signed and entered this 17th day of March 2022, at Niagara Falls, New

York.



HON. FRANK A. SEDITA, III, J.S.C.

ENTER:

Exhibit A

1 STATE OF NEW YORK
2 SUPREME COURT - PART II : COUNTY OF NIAGARA

3 In the Matter of the Application of the
4 SIERRA CLUB; DARLENE BULLSOVER; SYLVIU DAN, JR.;
5 and DEBORAH GONDEK,
6 Petitioners,

7 For a Judgment Pursuant to Article 78 of the
8 New York Civil Practice Law and Rules

9 -against-

Index No. E176242/2021
Motions

10 CITY OF NORTH TONAWANDA;
11 CITY OF NORTH TONAWANDA PLANNING BOARD;
12 FORTISTAR NORTH TONAWANDA LLC;
13 and DIGIHOST INTERNATIONAL INC.,
14 Respondents.

775 Third Street
Niagara Falls, New York
March 2, 2022

15 B e f o r e:

16 HONORABLE FRANK A. SEDITA, III
17 Supreme Court Justice

18 A p p e a r a n c e s:

19 LIPPES & LIPPES,
20 By: RICHARD LIPPES, ESQ.,
21 1109 Delaware Avenue,
22 Buffalo, New York 14209,
23 Appearing via Microsoft Teams
24 for the Petitioners.

25 NICHOLAS B. ROBINSON, ESQ.,
North Tonawanda Assistant City Attorney,
216 Payne Avenue,
North Tonawanda, New York 14120,
Appearing via Microsoft Teams
for the Respondents, City of North Tonawanda
and City of North Tonawanda Planning Board.

1 A p p e a r a n c e s : (C o n t i n u e d)

2 PHILLIPS LYTLE LLP,
3 By: WILLIAM V. ROSSI, ESQ.
4 and DAVID FLYNN, ESQ.,
5 One Canalside,
6 125 Main Street,
7 Buffalo, New York 14203,
8 Appearing for the Respondents,
9 Fortistar North Tonawanda LLC
10 and Digihost International, Inc.

11 JOSEPH NICHOLAS WILLIAMS, II, ESQ.,
12 1001 Delavan Avenue,
13 Buffalo, New York 14215,
14 Appearing via Microsoft Teams as In-House
15 Counsel for Digihost International, Inc.

16 AMY E. COGHLAN
17 Senior Court Reporter
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19
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1 THE COURT: The next matter is In the Matter of
2 the Application of the Sierra Club; Darlene Bullsover;
3 Sylviu Dan, Jr.; and Deborah Gondek, as Petitioners, For
4 Judgment Pursuant to Article 78 of the New York Civil
5 Practice Law and Rules vs. City of North Tonawanda; City
6 of North Tonawanda Planning Board; Fortistar North
7 Tonawanda, LLC; and Digihost International, Inc. as the
8 Respondents, Index Number E176242/2021. Counsel, would
9 you note your appearances for the record, please?

10 MR. ROSSI: Good morning, your Honor. Will
11 Rossi from Phillips Lytle on behalf of the Respond --

12 THE COURT: We start with the Plaintiffs first.
13 Who's here on behalf of the Plaintiffs?

14 MR. LIPPES: Yes, Richard Lippes on behalf of
15 Petitioners.

16 THE COURT: Or the Petitioners. Okay. We have
17 a new person that's virtual. You are again, sir?

18 MR. ROBINSON: Nicholas Robinson here on behalf
19 of the City of North Tonawanda.

20 THE COURT: Hold on. Let me start with who's in
21 the courtroom now. Who's in the courtroom?

22 MR. ROSSI: Good morning, your Honor. Will
23 Rossi from Phillips Lytle on behalf of the Respondents,
24 Fortistar North Tonawanda LLC and Digihost International
25 Inc.

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1 THE COURT: Who is that sitting next to you?

2 MR. ROSSI: Also with me is Dave Flynn, also
3 with Phillips Lytle.

4 THE COURT: Spell your last name. Spell --

5 MR. ROSSI: R-O-S-S-I.

6 THE COURT: I didn't get -- it was Flynn?

7 MR. ROSSI: I'm sorry. Dave Flynn, F-L-Y-N-N.

8 THE COURT: That's easy enough. All right. Who
9 else is here? Mr. Brown, do you want to announce your
10 appearance?

11 MR. ROBINSON: Judge, it's Nicholas Robinson,
12 City of North Tonawanda Planning Board and the City of
13 North Tonawanda.

14 THE COURT: Okay. Who else is here?

15 MR. WILLIAMS: Good morning, your Honor.
16 Nicholas Williams, in-house counsel for Digihost.

17 THE COURT: Is there some kind of -- all right.
18 Couple of -- the standard operating procedure. There's a
19 couple of warnings. First, there is a record function on
20 the Teams platform. We're having a mixed appearance
21 today. Some lawyers are appearing on Teams, some are
22 appearing in person. Same rules apply. You couldn't take
23 out your cell phone and record these proceedings either by
24 audio or visual means and you cannot do so on the Teams
25 platform either, even though there is a convenient little

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1 feature for you to do so. If you do so, if you record
2 these proceedings by either audio means or visual means,
3 you'll be in contempt the of court and I will abide by the
4 penalties attendant thereto, so don't do it. Plus,
5 everything said here today is being stenographically
6 recorded by a professional court reporter. Don't worry.
7 She's gonna get every word down. Secondly, if you are not
8 speaking -- this particularly applies to those on Teams --
9 please mute. It just -- technology just works a lot
10 better that way. I don't know why, but it does.

11 My process is to make a record, do a factual
12 summary, frame the relevant issues, and then invite the
13 parties to make oral argument. You don't need to repeat
14 what's in your moving papers in your oral arguments. I'll
15 demonstrate to you that I understand what's in your papers
16 and hopefully I understand the case. So, I expect to hear
17 from Plaintiffs' counsel Mr. Lippes, Mr. Robinson and Mr.
18 Rossi or Mr. Flynn. That's who I expect to hear from
19 today. Any arguments you want to make, please make them
20 within ten minutes. Okay? That's your cap. With that
21 being said, I'll make the requisite record.

22 Before the Court is Petitioners' Article 78
23 Petition seeking to void the City of North Tonawanda's
24 site plan approval of Respondent Digihost's bitcoin mining
25 facility, as well as Petitioners' motion for a preliminary

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1 injunction to halt operation of the bitcoin mining
2 facility. We also have the Respondent City of North
3 Tonawanda's motion to dismiss and Respondents Fortistar
4 and Digihost's motions to dismiss.

5 By way of background -- we'll go through the
6 parties. By way of background, the Petitioner Sierra Club
7 describes itself as a national grassroots not-for-profit
8 conservation corporation formed in 1892 in California.
9 The Sierra Club purportedly has 540,000 members
10 nationwide, including 54,000 in the State of New York,
11 including, and I quote from the papers, "members in
12 Niagara County and North Tonawanda who will be adversely
13 affected by the bitcoin data mining operation." That's in
14 Paragraph 2 of the Petition.

15 It is alleged in Paragraph 3 of the Petition
16 that Darlene Bullsover owns her home at 633 Walck Road in
17 North Tonawanda and that it is "nearby the site of the
18 proposed mining facility" and that she "is concerned about
19 the increased air pollution, noise pollution, greenhouse
20 gas omissions and increased traffic that will impact her
21 quality of life and conservation interest."

22 It is alleged in Paragraph 4 of the Petition
23 that Sylviu Dan, Jr. owns and resides at 516 Meadow Drive
24 in North Tonawanda and that it is, I quote again from the
25 Petition, Paragraph 4, "across the street from the

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1 proposed bitcoin mining facility" and that he "is
2 concerned about the increased air pollution, noise
3 pollution, greenhouse gas omissions and increased traffic
4 that will impact their quality of life and conservation
5 interest."

6 It is alleged in Paragraph 4 of the Petition
7 that Deborah Gondek owns and resides -- owns a house and
8 resides at 257 Brantwood Drive, North Tonawanda and it is
9 "nearby the site of the proposed bitcoin mining facility"
10 and that she "is concerned about the increased air
11 pollution, noise pollution, greenhouse gas omissions and
12 increased traffic that will impact her quality of life and
13 conservation interest."

14 Respondent Fortistar North Tonawanda LLC is
15 located at 1070 Erie Avenue in North Tonawanda. It is the
16 site of an energy generating plant whose energy will be
17 utilized to power the proposed bitcoin mining facility.
18 Fortistar sold property to Digihost to construct and
19 operate the bitcoin mining facility.

20 Respondent Digihost International Inc. is the
21 bitcoin mining facility developer.

22 Respondent City of North Tonawanda, which is
23 obviously a municipality, and the City of North Tonawanda
24 Planning Board, which I assume is a municipal agency,
25 approved the site plan for the bitcoin mining facility.

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1 The following chronology is of relevance and we
2 need to go through it:

3 On June 30th, 2021, Digihost filed the
4 application for site plan review for the proposed bitcoin
5 mining facility at the Fortistar energy plant site.

6 On July 12th of 2021, the North Tonawanda City
7 Planning Board referred the application to the Niagara
8 County Planning Board for comment and opinion.

9 On July 19th, 2021, Digihost's application was
10 discussed at the County Planning Board meeting. The
11 County Planning Board voiced their approval with two
12 conditions attached; namely, confirmation that the project
13 would be in compliance with the zoning regulations and
14 review by the Fire Department for safety.

15 On August 2nd, 2011, the North Tonawanda City
16 Planning Board declared itself as lead agency pursuant to
17 what is known as SEQRA -- that is an acronym for the State
18 Environmental Quality Review Act -- and issued a notice
19 for submission of public commentary.

20 On August 12th, 2021, Digihost prepared and
21 submitted an Environmental Assessment Form, also known as
22 an EAF form.

23 On September 2nd of 2021, the North Tonawanda
24 City Engineer prepared a report of all public comments and
25 recommended a negative SEQRA declaration. That means the

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1 project could go forward.

2 On September 8th of 2021, the North Tonawanda
3 City Planning Board reviewed the SEQRA record, issued a
4 negative declaration, and approved of the site plan. The
5 site plan approval was filed with the Clerk the following
6 day, that being September 9th of 2021.

7 On November 1st of 2021, Petitioners filed their
8 first Article 78 Petition. The Petition is signed by
9 Petitioners' counsel, Mr. Lippes.

10 On November 3rd of 2021, Petitioners filed an
11 Amended Petition that was again signed by counsel,
12 Plaintiffs' counsel, but now contained the verification as
13 well.

14 On December 1st of 2021, Petitioners filed a
15 Notice of Motion for Injunction supported by an Attorney's
16 Affidavit and certification by counsel and the following
17 documents: July 12th, 2021 meeting transcript;
18 Environmental Assessment Form; Public Notice; Fire
19 Department letter; City Engineer letter; September 8th,
20 2021 meeting minutes transcript; and the City of North
21 Tonawanda Clerk Affidavit.

22 Other filings made by the Petitioners include a
23 Memorandum in Reply to Respondents' motion to dismiss on
24 February 11th, 2022, which included a purported Expert
25 Affidavit of Maureen Harding. Petitioners also submit a

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1 Sur-Reply Affidavit offered by counsel on February 22nd of
2 2022. I think there's 40, 45 documents filed so far on
3 NYSCEF, the electronic filing system.

4 Most notably, however, Petitioners have never
5 filed nor have they submitted any affidavits or
6 verifications from any of the individually named
7 Petitioners that I put on the record themselves, or from
8 any identified members of the Sierra Club, which takes us
9 to the motions that are before the Court.

10 In support of their requested relief, which
11 included injunctive or includes injunctive relief, the
12 Petitioners principally contend that the bitcoin
13 facility's "massive" use of energy will result in
14 significant amounts of carbon based pollutants being
15 released into the atmosphere and that the -- again, I
16 quote from the Petitioners' papers -- "huge" fans being
17 used to cool the computer banks cause significant noise,
18 really cause what could be -- they characterize as noise
19 pollution.

20 As previously noted, Respondents City of North
21 Tonawanda, Digihost and Fortistar all move to dismiss the
22 Petitions as well as the Petitioners' request for
23 injunctive relief. Respondents premise their motions to
24 dismiss mainly upon -- they do it both upon procedural and
25 substantive grounds, but I'm going to focus on the

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1 procedural arguments. There are two procedural arguments
2 in favor of the Defendants', plural, motion to dismiss.

3 Respondents first contend that Petitioners lack
4 standing to bring the instant action. Specifically,
5 Respondents contend that because the Petitioners failed to
6 identify a member of the Sierra Club who will suffer an
7 injury, the Sierra Club lacks standing to bring this
8 action. Similarly, Respondents contend that the
9 individually named Petitioners make vague assertions of
10 living nearby to the proposed bitcoin mining site and fail
11 to allege any individual harm. Petitioners do not address
12 the lack of standing arguments raised by the Respondents
13 in the Petitioners' papers.

14 Respondents also contend that this action is
15 untimely filed and thus the Petition must be dismissed as
16 a matter of law. This additional procedural basis for
17 dismissal is premised upon New York statutes,
18 specifically, General City Law sections 38 and 27-a, which
19 impose a 30 day statute of limitations to challenge the
20 decision of a city planning board. In opposition to the
21 statute of limitations argument -- there is some
22 opposition argument here -- Petitioners acknowledge that
23 General City Law 38 and 27-a requires a 30 day statute of
24 limitations but suggests that the four month statute of
25 limitations for special proceedings as provided in

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1 C.P.L.R. 217 should be applied instead.

2 Mr. Lippes, it's your motion, sir. You're the
3 first in line so to speak cause you filed the Petition and
4 the request for injunctive relief, so you get to go first.
5 Please try to keep it at ten minutes, Mr. Lippes. Please
6 go ahead. Mr. Lippes, you have to unmute, sir.

7 MR. LIPPES: Yes.

8 THE COURT: There we go. Thank you.

9 MR. LIPPES: Okay. I will start with the
10 procedural issues as well, your Honor, and first point out
11 the rules dealing with the motion to dismiss, which I'm
12 sure the Court is very much aware. Briefly, the
13 determination of whether the motion to dismiss should be
14 granted is decided from the four corners of the Petition,
15 that the Petitioners should be given every potential
16 inference, and that the allegations in the Petition should
17 be deemed to be true. Saying that, I will start with --
18 very quickly with some of those we did mention.

19 The claim the Petition wasn't verified. As you
20 know, your Honor, the C.P.L.R. allows verification without
21 court approval within 20 days of filing the Petition or 20
22 days after an Answer is received. And we filed -- we
23 filed the Amended Petition within those periods of time.

24 The next is the claim that we failed to exhaust
25 administrative remedies because the zoning issues that we

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1 allege can only be determined whether or not -- whether or
2 not the bitcoin mining facility as it exists for use can
3 only be determined by the Zoning Board of Appeals and we
4 didn't go to the Zoning Board of Appeals. In fact,
5 neither did the City or the Building Commissioner. The
6 Petitioners would not have standing to go to the Zoning
7 Board of Appeals. Only the applicants that would be
8 aggrieved by a decision that they didn't like or the
9 Building Commissioner can go to the Zoning Board of
10 Appeals and, therefore, Petitioners could not fail to
11 exhaust administrative remedies.

12 The next issue was the one raised first in the
13 City of Niagara Falls papers concerning mootness. That
14 issue is really decided by the Dreikausen decision, which
15 we cited, and -- and the --

16 THE COURT: The appellate case you were talking
17 about, why don't you go ahead, repeat that.

18 MR. LIPPES: Yes. The Dreikausen case is the
19 landmark decision and the Dreikausen case says when
20 considering mootness, the most important issue is whether
21 a preliminary injunction motion was brought and of course
22 it was brought in this case. And at the time that it was
23 brought, there was little or no construction that had been
24 carried out and, therefore, any construction that took
25 place thereafter by the applicants was at their own risk

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1 cause they knew of the preliminary injunction motion. And
2 that is affirmed by the case that we cited, 101 Company,
3 LLC. So there are also sections of the Dreikausen points
4 out, including if there are important environmental issues
5 that are raised, so we do not believe that there is a
6 problem with mootness.

7 Now, as to standing, your Honor, the test of
8 standing is whether or not Petitioners --

9 THE COURT: Mr. Lippes, really, every appearance
10 with you, sir, we go through this. Please, please go back
11 a little bit and go through what you were going through
12 again. The reporter needs to be able to hear what you're
13 saying. Go ahead, sir.

14 MR. LIPPES: Of course. And I don't know why my
15 speakers aren't picking this up appropriately.

16 THE COURT: I've asked you before, Mr. Lippes,
17 to fix the problem, but the problem still exists. Go
18 ahead.

19 MR. LIPPES: Okay. So we're dealing with
20 standing now and the landmark decision with standing is
21 the society --

22 THE COURT: Mr. Lippes, the court reporter could
23 not hear you.

24 MR. LIPPES: Okay. Let's try again. The --
25 we're dealing with standing and the zone of interests of

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1 Society of Plastics. Can you hear me now?

2 THE COURT: Yes.

3 MR. LIPPES: Okay. Good. The Society of
4 Plastics case issued -- I'm sorry.

5 THE COURT: No. Your image is being partially
6 blocked out, sir. I don't know why. Go ahead.

7 MR. LIPPES: Yeah. I don't know why either.
8 That's never happened.

9 THE COURT: It would be easier if you were here
10 in person, but we'll deal with what we have to deal with.
11 Go ahead.

12 MR. LIPPES: Yes. The zone of interests test
13 requires that a person attempting to sustain standing
14 brings an action within the zone of interests of a
15 legislation that they're seeking to challenge or oppose,
16 which is rarely a problem in environmental cases like
17 this. And the second issue that we must show is that
18 they've been injured in a manner different than the public
19 at large. Since Society of Plastics, the injured
20 different than the public at large issue has produced a
21 number of conflicting cases, but the Court of Appeals in
22 the most recent case, Sierra Club v. Painted Post, which
23 is one of my cases, indicated that the number of people
24 involved does not defeat standing. The number of people
25 who claim the same injuries do not defeat standing. And

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1 second of all, that the allegations to support standing do
2 not have to be unique between the various Petitioners.

3 In the instant case, the Petitioners have
4 alleged, first of all, proximity to the Digihost site.
5 Now they don't claim that they live adjacent to the site,
6 but rather nearby, and the Respondents indicate that none
7 of them live closer than 1,000 feet. We do dispute that,
8 but there's nothing in the record to support that dispute.

9 THE COURT: Mr. Lippes, I hate to interrupt you,
10 sir, but you are at your ten minute limit. So if you
11 could try to wrap it all up, I would appreciate that.

12 MR. LIPPES: Okay. So we believe that the --
13 even without affidavits, which are not required in a
14 Verified Petition because the allegations in the Verified
15 Petition are considered evidentiary, and as we said
16 before, must be considered true, and the individual
17 Petitioners have alleged traditional environmental
18 concerns that included noise, et cetera, and that is a
19 major issue because of the noise from the fans.

20 There are other procedural issues and four
21 merits issues that we have not dealt with yet, including
22 whether or not this matter was filed in a timely manner.
23 And we proceeded pursuant to the C.P.L.R. four month
24 statute. The cases are split on that issue, but even
25 though the Court determines that there's a 30 day statute,

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1 that would not apply to our 239-m claim, since that is
2 jurisdictional and can be brought at any time. And the
3 zoning issues, because if the planning board approves
4 something in violation of zoning, it is ultra vires, and
5 that can only be brought beyond the 30 day period.

6 So those are all the procedural issues. I
7 haven't gone into the merits issues, unless the Court
8 wishes me to.

9 THE COURT: You do not have to, sir. Thank you,
10 Mr. Lippes. Who's going first, Mr. Robinson or Mr. Rossi?
11 I guess you are, Mr. Rossi.

12 MR. ROSSI: Your Honor, I'd be glad to go first.
13 Your Honor, you framed the issues for us and I will
14 distill my points down to the procedural points, as you
15 have instructed me to.

16 Focusing in particular on the statute of
17 limitations, there is a 30 day statute of limitations
18 here, and we've cited the authorities that you have
19 already pointed out. Now, Mr. Lippes just argued that
20 there is a four month statute of limitations here under
21 the general statute of C.P.L.R. 217. That statute also
22 says unless there is a specific statute authorizing the
23 proceeding that provides for a shorter statute of
24 limitations, and as your Honor already pointed out,
25 General City Law sections 38 and General City Law section

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1 27-a do in fact provide for a 30 day statute of
2 limitations. And in the Petitioners' reply papers, they
3 admit on page three of their reply this proceeding was not
4 commenced within 30 days, so that point has not been
5 disputed. In their words, if the 30 day statute of
6 limitations applies, they didn't meet the deadline. And
7 we know that it does apply because of the plain language
8 of 27-a, which I'll focus on simply because I believe it
9 is the clearer of the two statutes.

10 There is no doubt that we're dealing with a site
11 plan approval here. As you pointed out in the procedural
12 history, the relief that the Petitioners seek here is to
13 void the site plan approval issued by the City of North
14 Tonawanda Planning Board. Section 27-a is entitled site
15 plan approval. That is the statute that authorizes the
16 proceeding under Article 78 to challenge a decision to
17 approve a site plan. That's what we have here. Under
18 subsection 11, it says that proceeding, if you choose to
19 bring it, shall be commenced within 30 days. There's no
20 doubt it wasn't brought within 30 days, your Honor. And
21 with respect to that issue, that is dispositive for all
22 the causes of action.

23 The only other point I would mention about the
24 statute of limitations is that the Petitioners have argued
25 in their Sur-Reply that because they have an allegation

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1 under General Municipal Law 239-m, that that somehow gets
2 around the statute of limitations automatically. That's
3 simply not the case, your Honor. And we pointed this out
4 with a very recent Fourth Department decision, Coalition
5 for Cobbs Hill, which held simply because there is another
6 submission to the county, doesn't mean you have to redo
7 the submission to the county. That's the explicit holding
8 of that Fourth Department case from May 7th, 2021. And
9 the only thing that they've said in response to in their
10 Sur-Reply is that we made the allegation so we don't have
11 to comply with the statute of limitations. They don't
12 cite any case law to support that statement and it simply
13 is not so. The Fourth Department case I just referenced
14 says precisely the opposite, your Honor.

15 The final point that I'll make, Judge, is with
16 respect to standing. Mr. Lippes has acknowledged that
17 there is nothing in the record to support the Petitioners'
18 allegations. The only thing that they have said is that
19 the Court should simply assume that they have standing
20 based on their proximity to the site. But again, as he
21 acknowledged a moment ago, there is nothing in the record
22 to substantiate where it is that these Petitioners live
23 or, more importantly, what their specific injury is going
24 to be resulting from this power plant operating. The
25 power plant which has been in operation for 30 years I

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1 would add, with a full permit from the DEC.

2 Now, the final thing that I would point out,
3 Judge, is Mr. Lippes mentioned a case that was one of his
4 cases and that that was supportive of the exception
5 allowing mere proximity to support standing. I would
6 point out to a more recent case that the Sierra Club was
7 also the Petitioner in in the Second Department in 2021
8 which we cite in our reply papers, was Sierra Club v. Town
9 of North Castle, where the Appellate Division highlighted
10 this exact issue, and said you have alleged that you have
11 standing here because you have a general interest in this
12 proceeding, but that's unsubstantiated, and for that as a
13 separate dispositive reason you do not have standing
14 because there was no affidavit in the record before that
15 court.

16 With that, your Honor, unless you have any
17 questions, I will rest on my papers.

18 THE COURT: Nope. Thank you, Mr. Rossi.

19 MR. ROSSI: Thank you, your Honor.

20 THE COURT: Mr. Robinson?

21 MR. ROBINSON: Good afternoon, your Honor. I
22 will be brief here because I will not repeat Mr. Rossi's
23 argument, which I agree with. I will not be repeating
24 anything from my papers, your Honor.

25 I would like the Court just to notice several

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1 things since the papers were submitted that's just factual
2 items, your Honor.

3 Number one, the Building Department since this
4 time has issued a final Certificate of Occupancy for this
5 project. Number two, all the permits needed have been
6 taken out and satisfied according to the North Tonawanda
7 Building Department.

8 The final thing, Judge, that I would just like
9 to bring your attention to, is that the Petitioner brings
10 an Expert Witness Affidavit before the Court. That expert
11 witness is actually a member of the North Tonawanda
12 Planning Board. I believe that's a conflict of interest
13 here, your Honor. We would like you to know when this was
14 brought before the planning board, she was not a member of
15 it, but since the signature of the affidavit and
16 proceedings, she has been a member of the planning board,
17 which I'm representing, your Honor. That being stated, I
18 will rest on my papers.

19 THE COURT: Mr. Rossi, you're representing both
20 Fortistar and Digihost, right?

21 MR. ROSSI: Yes, your Honor.

22 THE COURT: Okay. So, Mr. Williams, you're a
23 neutral observer. Okay? So to speak. All right.

24 Although the Court is --

25 MR. LIPPES: Your Honor? Your Honor?

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1 THE COURT: What, Mr. Lippes?

2 MR. LIPPES: We have the opportunity to respond
3 briefly?

4 THE COURT: Respond briefly to what?

5 MR. LIPPES: To the arguments that were just
6 made by the two attorneys for the Respondents?

7 THE COURT: Why didn't you address those
8 arguments during -- look, okay, sure, Mr. Lippes. You
9 have five minutes. Go ahead.

10 MR. LIPPES: Yeah. I won't need five minutes.
11 Mr. Rossi said on his argument under 239-m, he really got
12 into the merits, said we don't have to make multiple
13 referrals, but as we indicated in our papers, we agree
14 with that broad statement, but only that it only applies
15 when the requirements of 239-m have first been met by the
16 appropriate papers being given to the County Planning
17 Board, and that did not happen here.

18 As to standing, the Respondents, they claim --
19 Mr. Rossi claims that we only base standing on proximity
20 only, and as we pointed out in our papers, even without
21 proximity, we allege traditional environmental issues that
22 the Petitioners are concerned about and why they are
23 challenging this proceeding. So even without proximity,
24 we believe that we would have standing to pursue this
25 action based upon the allegations of standing in the

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1 Petition. Thank you.

2 THE COURT: Thank you, Mr. Lippes.

3 Although the Court is sensitive to the issues
4 and concerns raised in the Petition, particularly by the
5 neighbors, the Court sits as a Court of Law, and because I
6 sit as a Court of Law, I must follow the law. In other
7 words, I must follow any governing state statutes, and I
8 must follow any binding precedent from the appellate
9 courts, including our state's highest court, which is the
10 Court of Appeals, and the intermedial appellate court,
11 which is the immediate appellate jurisdiction to this
12 court, the Appellate Division Fourth Department, which
13 sits in Rochester.

14 As a necessary pre-condition of many if not most
15 lawsuits, the person bringing the action, bringing the
16 lawsuit or the persons bringing the lawsuit must
17 demonstrate that they have standing or the legal right to
18 initiate a lawsuit. In addition to standing, the person
19 bringing the action or the persons bringing the action
20 must demonstrate that the action's filed in a timely
21 manner, in other words, that they have filed their lawsuit
22 within the applicable statute of limitations. Generally,
23 the Court does not reach the merits of claims raised in a
24 lawsuit unless those very three conditions which I just
25 described are satisfied.

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1 Let's start with standing. That an issue may be
2 one of public concern, even vital public concern, does not
3 entitle a party to standing in land use matters. The
4 Petitioner, in order to demonstrate standing, must show
5 that it suffered direct harm or injury that is in some way
6 different from that of the public at large. Society of
7 Plastics v. County of Suffolk, 77 NY2d 761, Court of
8 Appeals decision from 1991, which Mr. Lippes referred to
9 as one of the seminal cases in this area, if not the
10 seminal case. The principles apply regardless of whether
11 the Petitioner is a named individual person or an
12 association or an organization of persons. In this case,
13 Petitioners are both named individuals and an association
14 of persons, the Sierra Club.

15 Regarding individuals, standing is usually
16 established when the sworn affidavits of the Petitioners
17 themselves set forth their proximity to the proposed land
18 use and/or their repeated use of the land in question,
19 which is different from the public at large. That's the
20 key concept here. That's matter of Wooster v. Queen City
21 Landing, LLC, 150 AD3d 1689, a Fourth Department case from
22 2017. Moreover, allegations of harm must not be
23 conclusory or speculative. Matter of Sierra Club v. Town
24 of New Castle, 200 AD3d 694, Second Department case from
25 2021, pretty recent from December of 2021.

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1 In the area of associational or organizational
2 standing, the applicable principles are embodied in three
3 requirements: First, that the association or organization
4 is the Petitioner. The key determination to be made is
5 whether one or more of its members would have standing to
6 sue. Standing cannot be achieved merely by multiplying
7 the persons the group purports to represent. Second, an
8 association must demonstrate that the interests it asserts
9 are germane to its purposes so as to satisfy the Court
10 that it is an appropriate representative of those
11 interests. Third, it must be evident that neither the
12 asserted claim for the appropriate relief requires the
13 participation of the individual members. Again, *Society*
14 *of Plastics v. County of Suffolk*, 77 NY2d 761.

15 That Second Department case that I just
16 mentioned a moment ago, *Matter of Sierra Club v. Town of*
17 *New Castle*, 200 AD3d 694, the case that was argued by Mr.
18 Lippes, the Court recently held that standing is not
19 established in the absence of a showing that an
20 association's members will suffer an injury that is in
21 some way different in kind or degree from that of the
22 public at large as a result of the proposed project.

23 In this case, the named Petitioners submit their
24 allegations upon the verification of their attorney, Mr.
25 Lippes. The individual named Petitioners do not, however,

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1 submit any individual affidavits or sworn attestations,
2 nor does a member of the Sierra Club. It is merely
3 claimed that all Sierra Club members will suffer harm from
4 the proposed bitcoin facility. Similar conclusory,
5 nonspecific assertions are made on behalf of the
6 individually named Petitioners, who it is claimed will
7 suffer because they live nearby the facility without
8 defining what that exactly means. In sum, Petitioners
9 fail in either the Petition or Verified Petition to assert
10 the requisite, basic information required under the law to
11 establish that they will suffer an injury different in
12 kind and different than that of the public at large.
13 Accordingly, the Court finds that the Petitioners have
14 failed to establish standing.

15 Now, assuming for sake of argument that I got
16 that wrong, all right, that the Petitioners would have
17 standing, they must further demonstrate that they have
18 brought this action in a timely manner within the
19 applicable statute of limitations.

20 It is undisputed that the governing statutes,
21 New York State General City Law sections 38 and 27-a,
22 impose a 30 day statute of limitations to challenge a
23 decision of a city planning board, which is exactly what
24 we have here. That statute has been upheld as applied in
25 the Matter of Citizens against Sprawl-Mart v. City of

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1 Niagara Falls, 35 AD3d 1190, a Fourth Department case from
2 2006. The City Planning Board's decision was filed on
3 September 9th of 2021. This action was commenced on
4 November 1st of 2021, more than 50 days after the filing
5 of the City Planning Board's Decision. Accordingly, the
6 Court finds that this matter is untimely filed as well.
7 There would be no other finding I could make.

8 Mr. Williams, Mr. Rossi, I think it would be a
9 very good idea to reduce the noise that your facility's
10 generating. I think that would be a smart thing to do for
11 a lot of reasons. It would also be the decent thing to
12 do. It would also be the right thing to do, especially if
13 you wish to open additional facilities in this area or
14 this region. However, today, round one, and based upon
15 the foregoing as I have outlined it, and based upon the
16 law that applies, the Respondents' motions to deny a
17 preliminary injunction and dismiss the Petition are
18 granted for the reasons set forth by the Court.

19 Mr. Rossi or Mr. Robinson, doesn't matter which
20 one of you does it, maybe it's easier for you because
21 you're actually here, Mr. Rossi, you can talk to the court
22 reporter, please issue a -- please submit a proposed order
23 within three weeks with a transcript attached. And
24 there's several reasons that I ask for the transcript to
25 be attached, including if Mr. Lippe or his clients wish

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1 to appeal my decision to the Fourth Department, then the
2 appellate court will know my reasoning and rationale for
3 my decision today.

4 Anything else to do?

5 MR. LIPPES: No, thank you.

6 THE COURT: Thank you, Counsel.

7 MR. ROSSI: Thank you, your Honor.

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