

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA ex rel.,	)	
MARTIN LIPHARDT,	)	CI 25 -
Relator,	)	
	)	VERIFIED PETITION FOR WRIT
	)	OF MANDAMUS AND
v.	)	DECLARATORY JUDGMENT
	)	
THE CITY OF LINCOLN, doing	)	
business as LINCOLN ELECTRIC,	)	
SYSTEM, a municipal corporation,	)	
	)	
Respondent.	)	

COMES NOW, Martin Liphardt, and for his causes of action and claims for relief against the Respondent, states and alleges as follows:

INTRODUCTION

1. This is an action seeking an alternative and preemptory writ of mandamus compelling the City of Lincoln not to enter into a contract with any private, for-profit company for the electric service known as a Battery Energy Storage System ("BESS") and to prevent the illegal expenditure of funds for such electric service.

PARTIES

2. Relator, Martin Liphardt, ("Liphardt") is a customer of Lincoln Electric System, a resident of the County of Lancaster, taxpayer of the City of Lincoln (via sales tax) and citizen of Nebraska.
3. Respondent City of Lincoln is a municipal corporation organized under the laws of Nebraska. The Lincoln Electric System ("LES") is a municipal utility owned by the City of Lincoln.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this matter as the Relator's causes of action arise under Neb. Rev. Stat. §§ 25-2156 to 25-2169 (mandamus) and Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (declaratory judgments).

5. Venue is proper in this Court as all the parties reside or do business in Lancaster County and these causes of action arose in Lancaster County.
6. Liphardt owns real estate and resides approximately one mile from the Rokeby Generation Station, 8000 SW 12th St, Lincoln, Nebraska which is the proposed location of the Battery Energy Storage System ("BESS") that LES desires to build.

FACTS

7. Nebraska is a public power state. It is the public policy of Nebraska that "**electric service** should be provided by nonprofit entities including public power districts, public power and irrigation districts, nonprofit electric cooperatives, and municipalities." Neb. Rev. Stat. §70-1301. (emphasis added)
8. On July 14, 2025, the Lincoln City Council via Ordinance 21747, amended Lincoln Municipal Code (LMC) Chapter 27.02.03 B, 27.06.090, 27.62.060 b. and 27.63.840. A true and correct copy of Ordinance 21747 is marked as Exhibit A, is attached hereto and is incorporated by reference.
9. The party sponsoring the amendment to LMC was Eolian, L.P. ("Eolian").
10. LMC 27.02.030 B states as follows, "Battery Energy Storage System (BESS) shall mean a device **capable of storing at least 600 kilowatt** hours of energy to supply electrical energy to the grid at a future time. BESS shall not include a standalone 12-volt car battery or an electric motor vehicle." (emphasis added)
11. Eolian is a for-profit California-based private entity which owns and operates utility-scale battery energy storage systems (BESS) throughout the nation. Eolian is not a private electric supplier. Neb. Rev. Stat. §70-1001.01(11).
12. Within the electric utility industry, a BESS is also known as an ESR (energy storage resource). A BESS is also part of electric service. A BESS does not generate electricity; it stores electricity.
13. Following the passage of LMC 27.52.060, Eolian intends to apply for a conditional or special use permit, as appropriate, to build a BESS or

ESR, situated on 54 acres at or near the LES substation at 8000 SW 12th St., Lincoln, Nebraska. Eolian will own the Rokeby BESS or ESR.

14. The address of 8000 SW 12th Street, Lincoln, Nebraska is within the zoning jurisdiction of the County of Lancaster and the three-mile extraterritorial jurisdiction of the City of Lincoln.
15. Eolian intends to enter into a power tolling agreement, tolling agreement or similar contract with LES wherein LES will make monthly payments to Eolian based upon the capacity of the Rokeby BESS or ESR.
16. The electric system in Nebraska is comprised entirely of public power entities, including LES. All of Nebraska's electric suppliers are not-for-profit entities owned by consumers. There are limited exceptions or carve-outs under Nebraska law for the construction of electric generation facilities by private business entities and the authorization of private ownership and operation within Nebraska. One exception or carve-out is for "privately developed renewable **energy generation facilities...**" Neb. Rev. Stat. §§70-1001.01(12) and 70-1014.02. (emphasis added)
17. Neb. Rev. Stat. §70-1001.01(11) states, "Private electric supplier means an electric supplier producing electricity from a privately developed renewable energy generation facility that is not a public power district, a public power and irrigation district, a municipality, a registered group of municipalities, an electric cooperative, an electric membership association, any other governmental entity, or combination thereof. A private electric supplier is limited to the development of those facilities as provided in subdivision (12) of this section."
18. Neb. Rev. Stat. §70-1001.01(12) states, "Privately developed renewable energy generation facility means and **is limited to a facility that generates electricity** using solar, wind, geothermal, biomass, landfill gas, or biogas..." (emphasis added) This definition does not include a BESS or ESR.
19. It is the black letter law of Nebraska that an expressed object of a statute's operation excludes the statute's operation on all other objects unmentioned by the statute (*expressio unius est exclusio alterius*). *Heist v. Neb. Dept of Corr. Servs*, 312 Neb. 480, 979 N.W.2d 772 (2022); *Chapin Neuhoﬀ Broadcasting-Grand Island, Inc.*, 268 Neb. 520, 684 N.W.2d 588 (2004); *Pfizer v. Lancaster County Bd. of Equalization*, 260

Neb. 265, 616 N.W.2d 326 (2000); *Nelson v. Grzywa*, 9 Neb. App. 702, 618 N.W.2d 472 (2000).

A legislative intent may be found from the omission of words from a statute. *State ex rel Peterson v. Shively*, 310 Neb. 1, 963 N.W.2d 508 (2021).

20. The City of Lincoln, and its municipal utility LES, are prohibited by Nebraska law from entering into any tolling agreement, power tolling agreement or similar contract with Eolian with respect to the payment for energy stored in an ESR or BESS because Eolian is not a public power district, public power and irrigation district, nonprofit electric cooperative, or municipality and ownership of an ESR or BESS by a for-profit company is not expressly permitted by Nebraska statute.
21. The City of Lincoln, and its municipal utility LES, are prohibited by Nebraska law from paying public funds to any private company operating an ESR or BESS
22. On August 11, 2025, Realtor made demand upon the City of Lincoln that it not enter into any illegal contract with Eolian. The City of Lincoln did not respond to the Realtor's demand. The refusal of the City of Lincoln to meet the demand of Liphardt has caused him an injury in fact as his LES electric rates will increase based upon the refusal of the City of Lincoln to follow Nebraska law.

CLAIM FOR RELIEF

Mandamus

Violation of Neb. Rev. Stat. §32-1118

23. Relator incorporates paragraphs 1 through 22 as if fully set forth herein.
24. The ownership of an ESR or BESS by a private company such as Eolian is not authorized by Nebraska law.
25. Any payment of money by LES to Eolian per a tolling agreement, power tolling agreement or similar contract would be an illegal expenditure of public funds. *Johnson v. City of Omaha*, 319 Neb. 402, 23 N.W.3d 420 (2025); *Rath v. City of Sutton*, 267 Neb. 265, 673 N.W.2d 869 (2004).
26. The City of Lincoln and LES have a clear legal duty to not enter into a tolling agreement, power tolling agreement or similar contract with Eolian with respect to the payment for energy stored in an ESR or BESS

CLAIM FOR RELIEF
Uniform Declaratory Judgments Act
Neb. Rev. Stat. §§ 25-21,149 – 25-21,164

27. Relator incorporates paragraphs 1 through 26 as if fully set forth herein.
28. As a customer of LES, Relator is a person whose rights and electric rates are affected by Ordinance No. 21747 and Respondent's interpretation of Neb. Rev. Stat. §§70-1001.01(11)-(12) and 70-1014.02 or a contract or franchise between LES and Eolian.
29. Under Neb. Rev. Stat. §25-21,150. "[a]ny person ... whose rights, status, or other legal relations are affected by a ... statute, municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the ... statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder."
30. Courts have the power to "declare such rights, status, and other legal relations whether or not further relief is or could be obtained." Neb. Rev. Stat. §25-21,149.
31. There exists a current, ripe, and active dispute between Liphardt and the City of Lincoln regarding whether LES may enter into a tolling agreement, power tolling agreement or similar contract with Eolian for the payment of money in consideration for the storage of large quantities of electricity.
32. Liphardt therefore requires, and hereby requests, the Court issue an order declaring that the City of Lincoln and LES may not enter into a tolling agreement, power tolling agreement or similar contract with Eolian for the payment of money in consideration for the storage of large quantities of electricity.

PRAYER FOR RELIEF

WHIMEFORE, the Relator prays for relief as follows:

1. That the Court issue an alternative writ of mandamus and a peremptory writ of mandamus compelling and prohibiting Respondent

from entering into a tolling agreement, power tolling agreement or similar contract with Eolian, any assignee of Eolian or any other for-profit company engaged in the BESS or ESR business;

2. That the Court declare the rights, status and legal relations of Relator under Ordinance No. 21747, Neb. Rev. Stat. §§ 70-1001.01(11)-(12) and 70-1014.02;
3. That the Court issue a permanent injunction against the City of Lincoln prohibiting it from entering into a tolling agreement, power tolling agreement or similar contract with Eolian, any assignee of Eolian or any other for-profit company engaged in the BESS or ESR business;
4. That the Court award Relator his costs and attorney's fees per Neb. Rev. Stat. §25-2165; and
5. For such other and further relief as is just and equitable under the premises.

Dated this 19th day of September, 2025.

MARTIN LIPHARDT, Relator

By: David D. Begley
David D. Begley (#16795)
David D. Begley, Attorney at
Law, P.C., L.L.O.
4611 South 96th Street, Ste. 253
Omaha, NE 68127
(402) 915-0097
dbegley@lawyer.com

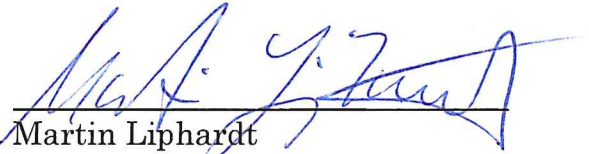
Attorney for Relator

VERIFICATION

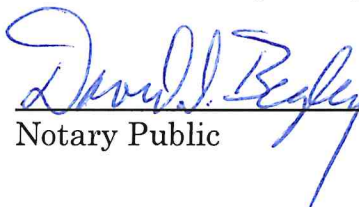
STATE OF NEBRASKA)
) ss.
COUNTY OF LANCASTER)

MARTIN LIPHARDT, being of lawful age and first duly sworn upon oath, deposes and says that he is a resident of the Lancaster County, Nebraska and a

ratepayer of Lincoln Electric System; that he has read the Verified Petition for Writ of Mandamus and Declaratory Judgment and knows the contents thereof; that he has conducted sufficient investigation into the facts alleged in said Verified Petition to enable him to swear to the truth of such allegations; and that the allegations contained therein are true and correct.


Martin Liphardt

SUBSCRIBED AND SWORN to before me this 19th day of September,
2025.


Notary Public





21747

25-54
TX25006

Introduce: 6-23-25

ORDINANCE NO. 21747

1 AN ORDINANCE amending Lincoln Municipal Code Section 27.02.030 B. to add a
2 definition for "Battery Energy Storage System"; by amending Section 27.06.090 Utilities Use
3 Group to add Battery Energy Storage System as a permitted special use in the AG zoning district
4 and a permitted conditional use in the H-3, H-4, I-1, I-2, and I-3 zoning districts; by amending
5 Section 27.62.060 Utilities Use Group to add the permitted conditional uses allowed in the H-3,
6 H-4, I-1, I-2, and I-3 zoning districts; and by amending Chapter 27.63 Special Permits to add a
7 new section numbered 27.63.840 entitled "Battery Energy Storage System" to add uses allowed
8 by special permit in the AG zoning district; and repealing Sections 27.02.030, 27.06.090, and
9 27.62.060 as hitherto existing.

10 BE IT ORDAINED by the City Council of the City of Lincoln, Nebraska:

11 Section 1. That Section 27.02.030 of the Lincoln Municipal Code be amended to read as
12 follows:

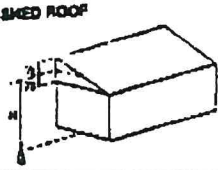
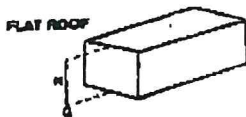
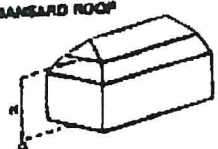
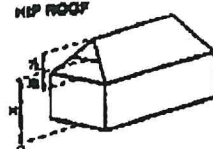
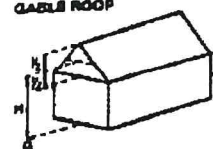
13 **27.02.030 B.**

14 **Basement** Basement shall mean that portion of a building between the lowest floor and the ceiling above
15 which is fully below grade or partly below grade and partly above grade but so located that the vertical
16 distance from grade to the floor below is more than the vertical distance from grade to ceiling.

17 **Battery Energy Storage System (BESS)** Battery Energy Storage System shall mean any device capable of
18 storing at least 600 kilowatt hours of energy to supply electrical energy to the grid at a future time. BESS
19 shall not include a stand-alone 12-volt car battery or an electric motor vehicle.



- 1 **Boarding** Boarding shall mean caring for, feeding, watering, or sheltering a pet animal belonging to
 2 another by any person or business for pay, trade, barter, commission, or remuneration of any sort.
- 3 **Breezeway** Breezeway shall mean a roofed outdoor passage, as between a house and a garage.
- 4 **Broadcast Tower** Broadcast tower shall mean a structure for the transmission or broadcast of radio,
 5 television, radar, or microwaves; provided, however, that personal wireless service facilities and
 6 noncommercial radio towers not exceeding fifty feet in height and amateur radio antenna installations
 7 shall not be considered broadcast towers.
- 8 **Building** Building shall mean any structure designed or intended for the enclosure, shelter, or protection
 9 of persons, animals, chattels, or property.
- 10 **Buildings, Height of** Height of a building shall mean the vertical distance above grade to the highest point
 11 of the coping of a flat roof or to the deck line of a mansard roof, or to the average height of the highest
 12 gable of a pitched, hipped, or shed roof. The measurement shall be taken from the grade.

Building Height	
 Diagram illustrating the height measurement for a building with a shed roof. The height (H) is measured from the grade (G) to the highest point of the roof.	 Diagram illustrating the height measurement for a building with a flat roof. The height (H) is measured from the grade (G) to the top of the roof coping.
 Diagram illustrating the height measurement for a building with a mansard roof. The height (H) is measured from the grade (G) to the top of the roof deck.	 Diagram illustrating the height measurement for a building with a hip roof. The height (H) is measured from the grade (G) to the average height of the highest gable.
 Diagram illustrating the height measurement for a building with a gambrel roof. The height (H) is measured from the grade (G) to the average height of the highest gable.	 Diagram illustrating the height measurement for a building with a gable roof. The height (H) is measured from the grade (G) to the average height of the highest gable.
H=Height of Building G=Grade	

Section 2. That Section 27.06.090 of the Lincoln Municipal Code be amended to read as follows:

27.06.090 Utilities Use Group.

Characteristics: The Utilities Use Group is characterized by the use of equipment for the purposes of distribution of basic utilities which provide service for, but is not limited to electricity, gas, phones, cable, and fiber optics. In addition, such uses include but are not limited to broadcast stations and towers, commercial wind energy conversion system, solar energy conversion system, personal wireless services facilities, and alternative and renewable energy generation systems.

Use Group Table:

27.06.090 Utilities Use Group Table																									
Uses	AG	AGR	R1	R2	R3	R4	R5	R6	R7	R8	O1	O2	O3	RT	B1	B2	B3	B4	B5	M2	M3	M4	I1	I2	I3
Battery Energy Storage System	S																				C	C	C	C	C
Broadcast stations										S	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P
Broadcast towers	S	S	S	S	S	S	S	S	S	S		S	S	S	S	S	S	S	S	S	S	S	S	S	S
Commercial Wind Energy Conversion System	S																								
Personal wireless services facilities	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S
Public utilities	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C
Solar Energy Conversion System (Large)	S																			P	P	P	P	P	P
Solar Energy Conversion System (Small)	P	S	S	S	S	S	S	S	S	S	S	S	S	S	P	P	P	P	P	P	P	P	P	P	P
Utility and cable television purposes	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	P	S	S	S	S	P	P	P
All other uses in this Use Group																							P	P	P

Section 3. That Section 27.62.060 of the Lincoln Municipal Code be amended to read as follows:

1 **27.62.060 Utilities Use Group.**

2 A building or premises may be used for the following use types as a permitted conditional use in the
3 designated zoning districts and in compliance with the conditions of approval applicable for that use type.

4 a. **Public Utilities.** Notwithstanding the regulations of the various districts, public utilities structures
5 may be erected where necessary in any district on any lot of one acre or more in area. Poles and
6 towers used for the support of wires and appurtenant equipment for supplying public utility
7 services shall not be considered as structures or buildings under this title. When located adjacent
8 to any residential district, such structures shall be screened in conformance with the standards
9 adopted by resolution of the City Council.

10 b. A Battery Energy Storage System is allowed in the H-3, H-4, I-1, I-2, and I-3 zoning districts under
11 the following conditions:

12 i. The system is used in association with energy transmission, substations, and/or solar or
13 wind energy conversion systems.

14 ii. Each Battery Energy Storage System must have an emergency action plan approved by
15 the Lincoln Bureau of Fire Prevention or Rural Fire District as applicable that includes
16 pertinent information in case of fire or other emergency on site, including but not limited
17 to, 24-hour contact information, access to lock boxes, access points, the location of shut
18 offs and circulation patterns.

19 iii. Safety data sheet information is provided to the Health Department for the battery chiller
20 systems.

21 Section 4. That Chapter 27.63 of the Lincoln Municipal Code be amended by adding a
22 new section numbered 27.63.840 to read as follows:

23 **27.63.840 Battery Energy Storage System.**

1 A Battery Energy Storage System may be allowed in the AG zoning district by special permit under the
2 following conditions:

3 i. The system is used in association with energy transmission, substations, and/or solar or
4 wind energy conversion systems.

5 ii. Must meet setback and height requirements of the district unless adjusted by the
6 Planning Commission.

7 iii. The Planning Commission may require additional screening to address site related
8 impacts of the Battery Energy Storage System.

9 iv. Each Battery Energy Storage System must have an emergency action plan approved by
10 the Lincoln Bureau of Fire Prevention or Rural Fire District as applicable that includes
11 pertinent information in case of fire or other emergency on site, including but not limited
12 to, 24-hour contact information, access to lock boxes, access points, the location of shut
13 offs and circulation patterns.

14 v. Safety data sheet information is provided to the Health Department for the battery chiller
15 systems.

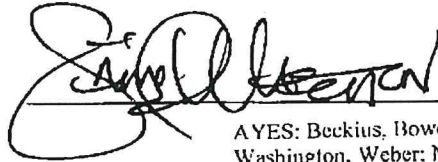
16 vi. The Planning Commission may impose such other conditions as are appropriate and
17 necessary to protect the health, safety, and general welfare of the public.

18 Section 5. That Sections 27.02.030, 27.06.090, and 27.62.060 of the Lincoln Municipal
19 Code as hitherto existing be and the same are hereby repealed.

20 Section 6. This ordinance shall be published, within fifteen days after the passage hereof,
21 in one issue of a daily or weekly newspaper of general circulation in the City, or posted on the
22 official bulletin board of the City, located on the wall across from the City Clerk's office at 555 S.
23 10th Street, in lieu and in place of the foregoing newspaper publication with notice of passage and

- 1 such posting to be given by publication one time in the official newspaper by the City Clerk. This
- 2 ordinance shall take effect and be in force from and after its passage and publication or after its
- 3 posting and notice of such posting given by publication as herein and in the City Charter provided.

Introduced by:



AYES: Beckius, Bowers, Carlson, Shobe.
Washington, Weber; NAYS: Duden.

Approved as to Form & Legality:


City Attorney

PASSED
JUL 14 2025
BY CITY COUNCIL

Approved this 17th day of July, 2025:

Mayor