SUPREME COURT, STATE OF COLORADO TWO EAST 14TH AVENUE DENVER, COLORADO 80203	
THE CITY OF LONGMONT, Petitioner, v. **JUDITH HENRY-HOBBS,** Respondent.	
Colorado Municipal League Geoffrey T. Wilson, #11574 1144 Sherman Street, Denver CO 80203 (303) 831-6411 City of Grand Junction Dan E. Wilson, #8533 250 North 5th Street, Grand Junction, CO 81501 (970) 244-1501 Attorneys for *Amici*	**Case No. 01SC88** Div.: Ctrm.:
BRIEF OF THE COLORADO MUNICIPAL LEAGUE AND THE CITY OF GRAND JUNCTION AS *AMICI CURIAE*	

Appeal from the Court of Appeals No. 99CA2231 (1/04/01)
Division V
Opinion of Judge Roy
Ruland and Nieto, JJ. Concur

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COME NOW the Colorado Municipal League (the "League") and the City of Grand Junction ("Grand Junction") by their respective undersigned counsel, pursuant to Rule 29, C.A.R., and file this brief as *amici curiae* in support of Petitioner, the City of Longmont ("City").

STATEMENT OF ISSUES ON APPEAL

The Colorado Municipal League and the City of Grand Junction adopt and incorporate by reference the statement of the issues on appeal in the opening brief of Petitioner, the City of Longmont.

STATEMENTS OF CASE, FACTS AND PROCEDURAL HISTORY

These *amici* hereby adopt and incorporate by reference the statements of the case, facts and procedural history in the opening brief for Petitioner, the City of Longmont.

SUMMARY OF ARGUMENT

In the case at bar, the Court of Appeals based its decision almost entirely upon *Burnworth v. Adams County*, 826 P.2d 368 (Colo. App. 1991), where the court ruled that storm water facilities fall within the waiver of sovereign immunity for injuries arising from the operation of a "public sanitation facility." See, §24-10-106(1)(f). *Burnworth* was wrongly decided because, among other things, that Court ignored the record of the General Assembly distinguishing between "sanitation" facilities and "storm water" facilities, distinctions that have been evident in Colorado statutes since at least 1923.

Even if the Court of Appeals' conclusion is upheld that the irrigation canal at issue here is a "public sanitation facility," the decision of the Court of Appeals should nevertheless be reversed because the City did not "operate" the canal, as that term is defined at §24-10-103(3) C.R.S.

ARGUMENT

The decision of Court of Appeals should be reversed, because the Court, principally relying on *Burnworth v. Adams County*, failed to recognize that a municipal storm drain system performs a distinct and separate municipal function from the function performed by a sanitary facility. Alternatively, the decision of the Court of Appeals should be reversed because the City does not "operate" the Oligarchy Ditch, as the term "operate" is used in the Governmental Immunity Act.

Amici hereby adopt and fully incorporate by this reference the argument made by the petitioner City in its opening brief to this Court. *Amici* submit the following additional argument.

The Court of Appeals based its decision in the case at bar almost entirely upon *Burnworth v. Adams County*, 826 P2.d 368 (Colo. App. 1991). The *Burnworth* panel found that a storm drain was part of a "sewerage facility," and equated it to a "public sanitation facility." *Id.* at 370. Under the Governmental Immunity Act ("GIA" or the "Act"; §§24-10-102 to 120, C.R.S.), sovereign immunity is waived in an action for injuries resulting from the operation and maintenance of any "public ... sanitation facility." §24-10-106(1)(f), C.R.S. However, "public sanitation facility" is not defined in the Act.

While this Court has recently said that waivers of sovereign immunity will be broadly construed, *Corsentino v. Cordova*, 4 P.3d 1082, 1086 (Colo. 2000), there are clear limits on such construction. It is well established that "a court's primary task in interpreting a statute is to give effect to the legislative purpose underlying its enactment." *See, In re: Ballot Title 1999-2000, No. 219,* 999 P. 2d 1819, 1820 (Colo. 2000); accord: *Colorado Compensation Insurance Authority v. Jorgensen*, 992 P. 2d 1156, 1163 (Colo. 2000) (when interpreting a statute, a court "must determine and give effect to the legislative intent;" in construing statutory language a

court "may explore various sources of legislative intent, including the consequences of a particular construction."), *People v. Baer*, 973 P.2d 1225, 1228 (Colo. 1999); §2-4-203(1)(a), (b) and (e), C.R.S.

The public policy rationale for the GIA, and the intent of the General Assembly in adopting it, are clearly expressed in the legislative declaration:

> The general assembly ... recognizes that the state and its political subdivisions provide essential public services and functions and that unlimited liability could disrupt or make prohibitively expensive the provision of such essential public services and functions. The general assembly further recognizes that the taxpayers would ultimately bear the fiscal burdens of unlimited liability and that limitations on the liability of public entities and public employees are necessary in order to protect the taxpayers against excessive fiscal burdens.

§24-10-102, C.R.S.

Thus, construction of the waiver provisions in the GIA should not be so broad as to frustrate or defeat the obvious intent of the General Assembly. It is also an axiom of statutory construction that strained or unusual definitions of terms are not accepted. *See*, §2-4-101, C.R.S. ("words and phrases shall be read in context and construed according to...common usage"); *State v. Nieto*, 993 P.2d 493 (Colo. 2000) (Courts will endeavor to give effect to "ordinary meaning of words used by the legislature").

Amici respectfully urge that these rules and axioms prove that *Burnworth* was wrongly decided. The *Burnworth* court, as will be more fully developed below, adopted an unusual definition of "sanitation facilities" that included storm water facilities. This wasn't "broad construction." Respectfully, *amici* submit that this was "wrong construction." *Burnworth* opened the barn door. The Court of Appeals' decision in the case at bar illustrates in stark terms just

where this horse might run, once it is out of the barn.

The decision of the Court of Appeals permits a construction that governmental immunity is waived for injuries that occur in connection with any storm water conveyance, man-made or natural, privately owned or not, if a defendant public entity has agreed to perform, or has performed, some maintenance even where there is no causal connection alleged between the injury and the episodic "maintenance."

Can it fairly be said that the General Assembly intended to impose liability on a municipality within which storm water flows into Clear Creek, the Platte River or the Colorado River, if the municipality from time-to-time does bank stabilization to prevent erosion, because such water bodies are now defined as part of the municipality's "public sanitation facility?" If so, whenever someone unfortunately drowns in the Platte as it passes through Denver, this new "broad construction" of the GIA immunity waiver at issue here will permit Denver to be sued for negligent "operation and maintenance" of its "public sanitation facility." Can this none too remote a possibility be reconciled with the General Assembly's ultimate intent in adopting the GIA "to protect the taxpayers against excessive fiscal burdens?" §24-10-102, C.R.S.

This appeal presents this Court with an opportunity to close the barn door opened by *Burnworth,* by holding that "public sanitation facilities" do not include storm water facilities. Alternatively, the Court could rein in *Burnworth,* by holding that storm water facilities are public sanitation facilities *only* when such facilities are truly operated *and* maintained by the public entity, as the General Assembly has explicitly required in the Act. *See:* §24-10-106(1)(f), C.R.S.

(a) In statutes directly pertaining to sewers, sewerage and the like, the General Assembly has repeatedly distinguished between "sanitary" sewers and storm water drainage and conveyance facilities.

In its opinion in the case at bar, the Court of Appeals stated:

> We recognize, as the City argues, that storm drainage systems may not be considered "sanitation systems" by civil engineers or municipalities, who limit the term to facilities that transport wastewater. Indeed, sanitation systems and storm drainage systems as defined by civil engineers in municipalities are, and must be, totally separate.

2001 CJ C.A.R. at 243. (The opinion of the Court of Appeals is attached as Appendix A.)

A review of various statutes directly relating to sewers and sewerage reveals that the General Assembly shares the view of municipalities and civil engineers that storm water facilities are something very different from the sanitary facilities of a public entity.

For example, the article of the municipal government title of the Colorado Revised Statutes concerning public improvements authorizes municipalities to "establish and maintain sewer systems and sewage disposal plants for *sanitary or storm drainage*." §31-25-504, C.R.S. (emphasis added). The General Assembly's distinction between sanitary facilities and storm water facilities is further exemplified by §31-25-505, C.R.S., in which municipalities are authorized to "order the construction of [special improvement] district *sanitary* sewers" (emphasis added), while later, in the same article, at §31-25-508, C.R.S., municipalities are *additionally* authorized to "order the construction of [special improvement] district sewers for *storm drainage* ..." (emphasis added).

Section 31-25-509, C.R.S., concerning establishment of storm water or sanitary sewer

special improvement subdistricts, is particularly illustrative:

> At the time of ordering the construction of district *sanitary or storm sewers* or at any time thereafter, the construction may be ordered in like manner in subdistricts, in such manner as to connect the subdistricts, or such part thereof, with the district *sanitary or storm sewer* for the purpose of *sanitary or storm drainage.* The cost of subdistrict *sanitary or storm sewers* in each subdistrict or part thereof, with the appurtenances, may be assessed upon all the land in the subdistrict or in the part improved in proportion as the area of each piece of land in the subdistrict or in the part improved is to the area of all the land in the subdistrict or in the part improved exclusive of public highways. Combined sewers for *sanitary and storm drainage* may be authorized and constructed in the same manner as provided for the construction of *sanitary or storm sewers* and the cost thereof assessed in the same manner and proportion.

Id. (emphasis added).

Section 31-25-512 provides in pertinent part that "The costs of any district *sanitary sewer* ... and of [special] district *storm sewers* may be assessed by ordinance upon all of the real estate in the district." (Emphasis added).

Significantly, the General Assembly's distinction in the foregoing statutes between sanitary facilities and those designed to handle storm water is long standing, well predating the General Assembly's adoption of the GIA in 1971. *See:* 1971 Colo. Laws, 1204-1218, Ch. 323. The provisions discussed above were first adopted in 1923. *See*: respectively, 1923 Colo. Laws, pps. 630, §9; p. 631, §10; p. 632, §13; p. 632, §14. The distinction is particularly evident in the fact that the cost assessment authority now found in one section at §31-25-512, C.R.S., for both sanitary sewers *and* storm sewers, was enacted in 1923 as two *separate* sections, one for sanitary sewers (1923 Colo. Laws, 632, §12), and another for storm drainage sewers (1923 Colo. Laws, 632, §14).

Additional authority for municipalities to acquire or construct "sewerage facilities" is found at §§31-35-401 to 417, C.R.S. In this statute, the definition of "sewerage facilities" provides further evidence that the General Assembly understands the difference between storm water and what flows through sanitary sewers, and that separate facilities are usually involved in handling each (though at times such facilities are "joint").

> "Sewerage facilities" means any one or more of the various devices used in the collection, treatment, or disposition of sewage or industrial waste of a liquid nature or storm, flood, or surface drainage waters, including . . . *joint storm and sanitary sewers* . . ..

§31-35-401(6), C.R.S.

An identical definition appears in a comparable statute granting counties authority to construct "sewerage facilities" at §30-20-401(4), C.R.S. The *Burnworth* court cited the references in this definition to "storm, flood or surface drainage" waters in support of its opinion that "public sanitation facilities" means the same thing as "sewerage facilities," 826 P.2d at 370.

Remarkably, and significantly, the *Burnworth* court completely ignored the fact that the very definition that it quoted illustrated the General Assembly drawing a distinction between storm and sanitary sewers, in its reference to "joint storm and sanitary sewers." Obviously, if "sanitary sewers" included in all cases "storm sewers," the separate references to storm sewers in this and all of the other statutes discussed here would be surplusage. Thus, the *Burnworth* court's decision runs directly contrary to the fundamental rule of construction that "interpretations that render statutory provisions redundant and superfluous should be avoided." *Jorgensen*, 992 P.2d at 1163; accord: *Slack v. Farmers Insurance Exchange,* 5 P. 3d 280, 284 (Colo. 2000).

Additionally, the special district title of the Colorado Revised Statutes includes the following definition of "sanitation district":

> "Sanitation district" means a special district that provides for *storm or sanitary sewers,* or both, flood and surface drainage, treatment and disposal works and facilities, or solid waste disposal facilities or waste services, and all necessary or proper equipment and of appurtenances incident thereto.

§32-1-103(18) C.R.S. (Emphasis added).

In quoting this definition, 826 P.2d at 370, the *Burnworth* Court once again utterly failed to note the critical fact that the expressly distinguishes between "storm *or* sanitary sewers" (emphasis added).

The definitions quoted by the *Burnworth* court *do not* indicate that "public sanitation facilities" or "sanitary sewers" include storm sewers. What these definitions, as well as the other statutes discussed above do illustrate is that, while both types of facilities may be "sewerage facilities," the General Assembly has for many years recognized that "sanitary" and "storm water" systems are entirely separate facilities.

These statutes were either not considered or misread by the *Burnworth* court. These statutes provide a compelling basis for this Court to correct the Court of Appeals' interpretation of what is meant by the term "public sanitation facilities" in the GIA. Indeed, "in determining the intention of the General Assembly" courts may consider "former statutory provisions, including laws upon the same or similar subjects." §2-4-203(1)(d), C.R.S.; *accord: Colorado Civil Rights Commission v. North Washington Fire Protection District,* 772 P. 2d 70, 78 (Colo. 1989); *Montes v. Hyland Hills Park and Recreation District,* 849 P 2.d 852, 854 (Colo. App. 1993); 2A *Sutherland Statutory Construction*, §51.02 (5th Ed., 1992). Furthermore, "when two

statutes address the same subject matter, courts will attempt to construe them harmoniously." *City of Lakewood v. Mavromatis*, 817 P. 2d 90, 96 (Colo. 1991).

In the context of the statutes discussed above, it is apparent that when the *Burnworth* court construed "public sanitation facility," it missed the distinction that the General Assembly had been making since at least 1923 between storm water and "sanitary" facilities. While the General Assembly might have referred to *both* "public sanitation facilities" *and* "storm water facilities" in the waiver of immunity at §24-10-106(1)(f), C.R.S., significantly, it did not do so.

Amici respectfully urge that the broad construction of GIA immunity waivers directed in *Corsentino* cannot legitimize the Court of Appeals, either in *Burnworth* or in the case at bar, reading into an immunity waiver that which its language simply does not provide. Such a dramatic expansion of tort liability for public entities across Colorado should be accomplished through amendment of the Governmental Immunity Act, following a full debate of the policy and fiscal consequences of such an amendment before the General Assembly. The decision of the Court of Appeals should be reversed.

(b) Even if the irrigation canal at issue in this case could be classified as a "public sanitation facility," the decision of the Court of Appeals should be reversed, because the City of Longmont did not "operate and maintain" the canal.

As suggested above at page 4, even if the irrigation canal (into which the City from time-to-time discharged storm water runoff) could potentially be a "public sanitation facility," the Court of Appeals' decision should be reversed because the City did not operate *and* maintain the facility as expressly required for the waiver of immunity, pursuant to §24-10-106(1)(f), C.R.S.

As fully developed in the City's brief, the City does not "operate" the Oligarchy Ditch, as that term is defined in the Act. *See:* §24-10-103(3), C.R.S. This fact should be dispositive of the

issue. As this Court said in *City and County of Denver v. Gallegos*, 916 P.2d 509 (Colo. 1996), in construing the companion waiver of immunity in §24-10-106(1)(f), C.R.S. for injuries arising from operation and maintenance of public water facilities:

> In 24-10-106(1)(f), the legislature did not use the terms "maintenance" and "operation" loosely or interchangeably. The word "and" in this provision conclusively establishes that governmental immunity is waived only where the public entity both operates and maintains the public water facility. If the legislature had wished to use the term "or" instead of "and," it could have easily done so. For example, subsection (1)(b) of the same statute provides an exemption from immunity for the "operation" rather than the "operation and maintenance" of public hospitals, correctional facilities, or public jails. §24-10-106(1)(b), 10A C.R.S. (1988) It can thus be concluded that, in drafting §24-10-106(1)(f), the legislature intended for governmental entities to be liable only when they both operate and maintain a public water facility.

Id. at 512.

Respectfully, *amici* urge this Court to stay the course announced in this critical respect in *Gallegos*. The broad construction of GIA immunity waivers subsequently directed by this Court in *Corsentino*, 916 P.2d at 512, should not extend to reading the General Assembly's choice of the conjunctive "and" (in §24-10-106(1)(f), C.R.S.) to actually mean a disjunctive "or". As with the notion of adding a waiver for injuries arising from the operation and maintenance of "public storm water facilities," an amendment to the Act exposing public entities to liability if they *either* operate *or* maintain a public sanitation facility would have profound policy and fiscal implications for public entities across Colorado, and should thus be fully debated before the General Assembly before adoption.

In the case at bar, the Court of Appeals cites *Burnworth* and three of its progeny (all

Court of Appeals decisions), 2001 C J C.A.R. at 243, as authority. These cases are readily distinguished from the one now before this Court because in those cases the issue whether the public entity operated *and* maintained a facility did not arise.

In *Gallegos*, this Court distinguished the facts before it from those in *Burnworth* by pointing out that "[t]he storm drain in that case was both operated and maintained by the county," 916 P.2d at 511. *Powell v. City of Colorado Springs*, 25 P.3d 1266 (Colo. App. 2000), concerned a city "owned and operated" drainage ditch, *Id.* at 1267, a situation very different from that presented here, where the City neither owns nor, significantly, operates the Oligarchy Ditch. In *Scott v. City of Greeley,* 931 P.2d 525 (Colo. App. 1996), "... there was no dispute at trial that the City actually 'operates and maintains' the storm sewer in question." *Id.* at 528. Finally, *Smith v. Town of Estes Park*, 944 P.2d 571 (Colo. App. 1996) involved a "slip and fall" injury on ice that had accumulated in a cross pan constructed and designed by the City to transport storm water into a municipal culvert; the cross pan had been maintained by the City. The *Smith* court found that under these facts the injury involved a storm drainage system that was "operated and maintained" by the City.

In contrast, the facts in this case provide solid support for a conclusion that the City of Longmont did not "operate" the Oligarchy Ditch, as the term "operate" is defined in the GIA. Plainly, the ditch here is privately owned and operated by the ditch company. Yet the Court of Appeals chose to ignore these facts. This was error. The decision of the Court of Appeals should be reversed.

CONCLUSION

WHEREFORE, for the reasons stated above, *amici* urge that the decision of the Court of Appeals be reversed.

Respectfully submitted this _____ day of September, 2001.

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Brief of the Colorado Municipal League and the City of Grand Junction as *amici curiae* was placed in the U.S. Postal System by first class mail, postage prepaid, on the _____ day of September, 2001, addressed to the following:

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