

Aloha Chair and Committee Members,

My name is Edward Codelia, and I am a resident of Kula. I support reliable water for Department of Hawaiian Home Lands beneficiaries and the prompt placement of Native Hawaiian families on homestead land. I respectfully request that the Committee defer Bill 97 because the proposed agreement would bind the County before material drafting inconsistencies, legal-compliance questions, fiscal exposure, and contract safeguards are resolved.

I am not asserting that every issue below is already a proven violation. Several are unresolved legal risks that require a documented answer before the County commits water-system capacity and long-term operating responsibilities.

1. The ordinance and agreement identify different instruments and different approval methods.

Maui County Code Section 2.20.020 requires ordinance authorization before the Mayor enters an intergovernmental agreement or amendment that places a financial obligation on the County or a County department.

Bill 97 is an ordinance, so the bill is using the approval method required by Section 2.20.020. But Bill 97 authorizes execution of a "Memorandum of Agreement," while Exhibit A is entitled "Agreement Concerning Development and Dedication of Waiohuli Wells." Agreement Section 12 then says Council approval will occur "by resolution" under Chapter 2.20.

The defect is the internal drafting inconsistency, not the use of an ordinance in Bill 97. Before enactment, the title of the instrument, the authorization clause, Section 12, and the final execution copy should match exactly. The Mayor should be authorized to sign only the version attached to the enacted ordinance.

2. "At no cost to DWS" does not describe the County's full financial exposure.

Agreement Section 2 says DHHL will perform the development and construction work "at no cost to DWS." But the incorporated recitals and Section 2(x) also require DWS to assist DHHL in pursuing funding, including County funding if available.

After DWS accepts the facilities, Agreement Section 5 requires DWS to operate and maintain the wells, sites, tanks, transmission pipeline, and associated improvements and provide monthly reports. Under Section 1.04, DHHL's obligation to install treatment for excessive chloride or other regulated contaminants ends upon DWS acceptance. The construction warranty in Section 6 lasts only one year.

Those provisions create continuing County responsibilities even if DHHL pays the initial construction cost. Yet the packet contains no disclosed annual electricity, staffing, testing, treatment, repair, replacement-reserve, lifecycle, or ratepayer-impact analysis.

Charter Section 8-11.7 requires DWS revenues to be kept in a separate fund and to make DWS self-supporting, while expressly allowing Council-issued general-obligation bonds and capital-improvement appropriations. The Charter does not prohibit County capital support, but the present record does not permit an informed assessment of how the accepted facilities would affect DWS's self-supporting operations.

3. The packet does not document the studies the Charter assigns to DWS.

Charter Section 8-11.2(2) directs DWS to make studies, surveys, and investigations concerning water-source locations, amounts available for current and prospective uses, and maximum sustainable yield.

The agreement assumes three wells at 600 gallons per minute each. That produces the stated theoretical capacity of 2.592 million gallons per day at 24-hour pumping and the stated DWS operating capacity of 1.728 million gallons per day at 16-hour pumping. Those calculations are arithmetically correct. But the Committee packet contains no pumping-test analysis, aquifer-interference analysis, accepted source assessment, or study substantiating that the proposed yield is sustainable and reliably deliverable at drinking-water quality.

The Charter provision is a continuing duty of DWS; it does not expressly say that a particular study is a statutory condition precedent to this ordinance. Still, because the agreement promises source credits based on those production assumptions, the Council should receive the underlying DWS study or a written technical finding identifying the evidence on which DWS relies.

The packet also uses "39.5 percent" inconsistently. Agreement Section 7 says the 683,400-gallon-per-day advanced allocation is approximately 39.5 percent of the source needed by DHHL. The April 20, 2026 Hawaiian Homes Commission (HHC) submittal in the same packet says 1.728 million gallons per day is approximately 39.5 percent of DHHL's identified water needs. Both statements cannot describe the same total need. The baseline must be corrected.

4. The agreement creates a serious, but not yet conclusively resolved, Community Plan conflict.

Charter Section 8-11.2(3) directs DWS to implement the County General Plan and community plans in administering its affairs.

The Makawao-Pukalani-Kula Community Plan contains two relevant policies. It prioritizes newly available water for diversified agriculture and DHHL projects, and it supports immediate

allocation for DHHL projects. It also directs the County to restrict water developed within or imported to Upcountry to consumption within Upcountry, except for agricultural use.

The proposed agreement grants source credits for DHHL developments in Upcountry, Central, and South Maui and connects the Waiohuli wells to the Central Maui system. These provisions create a fiscal tension between two policies in the same plan. I do not claim the record establishes a definitive plan violation; however, I request a written Planning Department and Corporation Counsel reconciliation explaining how Central and South Maui use is consistent with the Community Plan and Charter, or identifying the approval or plan amendment needed.

5. The public-trust record must show actual consideration of competing protected uses.

Article XI, Sections 1 and 7 of the Hawai'i Constitution and the Hawai'i Supreme Court's decision in *Kauai Springs, Inc. v. Planning Commission* impose an affirmative duty on the State and its political subdivisions to consider the public trust in planning and allocating water. There are no absolute priorities among protected uses; competing uses must be weighed case by case.

Water reserved for DHHL and used by beneficiaries is itself a protected public-trust use. That important status does not eliminate the need to examine source sustainability, domestic needs, water in its natural state, traditional and customary practices, other current users, and future generations.

Agreement Sections 1.03 and 7 reserve all operating capacity from the wells, including capacity created by future expansion, solely for Hawaiian Home Lands; promise source credits of "not less than" 1.728 million gallons per day on a first-priority basis; and allow the credits to be used in perpetuity. The agreement also says the capacity is "not for the benefit of the general public."

I do not assert that the Council must enter formal adjudicatory findings in the text of a legislative ordinance. I do assert that the County's record should demonstrate substantive public-trust consideration before it approves a long-term allocation of this scale. The present packet does not contain that analysis. The agreement should also state expressly that no provision creates a vested right immune from the County's continuing constitutional public-trust duties or lawful emergency and regulatory authority.

6. Advanced meters would be tied to filing a CWRM application, not issuance of the State permits.

Agreement Section 7 provides that, upon DHHL's request, DWS will issue meters up to 683,400 gallons per day after a well-construction permit application has been filed, DHHL has commenced development of the wells, and the applicable source, storage, and transmission fees are paid.

HRS Section 174C-84 separately prohibits well construction and pump installation from beginning without the appropriate Commission on Water Resource Management permits. CWRM may issue a permit only after determining compliance with applicable law and obtaining Department of Health review.

The filing trigger in the agreement does not itself violate Section 174C-84 because it controls meter issuance, not permission to drill. The legal and fiscal risk is that filing an application does not establish that CWRM will approve the location, construction, pump, or expected capacity. It also does not establish sustainable production or drinking-water compliance.

Using the packet's Maui single-family planning guideline of 600 gallons per unit per day, 683,400 gallons per day equals 1,139 single-family residential equivalents. That is an equivalency calculation, not a representation that exactly 1,139 meters or homes will be served. Even so, it shows the scale of the interim commitment.

Advanced meters should not be issued until the required CWRM permits and Department of Health approvals are obtained, or the agreement should contain a specific, enforceable source replacement, escrow, capacity restoration, or other remedy if the wells are not completed.

7. The timing of Chapter 343 environmental review requires a written legal determination.

HRS Section 343-5 generally triggers environmental review for actions proposing the use of State or County lands or funds. **Hawaiian home lands are "State lands" for Chapter 343 purposes.** For agency actions, review must occur at the earliest practicable time, and acceptance of a required environmental impact statement is a condition precedent to implementation. For applicant actions, acceptance is a condition precedent to agency approval and commencement.

The agreement treats environmental assessments as work DHHL will perform after the agreement is executed. The packet contains no environmental assessment, FONSI, accepted EIS, exemption determination, or written analysis identifying the Chapter 343 proposing agency, approving agency, accepting authority, and lawful decision point.

The timing issue is nuanced. HRS Section 343-2 defines an "agency" as an executive-branch department, office, board, or commission, so the County Council itself is not the Chapter 343 agency. DWS and DHHL, however, are executive agencies and would enter and implement the agreement. The agreement is also more than a feasibility study because it establishes source credits, advanced-meter rights, a use restriction, and future County operating duties.

I therefore do not state categorically that passage of Bill 97 would violate Chapter 343. I request deferral until DWS, DHHL, and Corporation Counsel provide a written determination explaining

whether execution of this binding agreement may lawfully precede Chapter 343 review and identifying the actions that cannot occur before review is complete.

8. Historic-preservation and cultural review must be made enforceable project conditions.

The version of HRS Section 6E-8 effective July 1, 2026 requires the lead agency, before commencing a project that may affect historic property, an aviation artifact, or a burial site, to determine potential effects and give the State Historic Preservation Division an opportunity for review. For DHHL projects, DHHL must consult with the department concerning effects on historic property or burial sites.

Section 6E-8 requires review before project commencement; it does not clearly require completion before this Council ordinance. The legally accurate remedy is to make completed Chapter 6E review an express condition before ground disturbance and to require the agreement to incorporate any avoidance, monitoring, or mitigation commitments. The same approach should apply to the cultural review and Ka Paʻakai analysis that the April 20, 2026 HHC submittal says the project will complete.

9. The general default clause does not solve the advanced-meter failure scenario.

Agreement Sections 10.01 through 10.03 provide notice, cure, damages, specific performance, and cumulative legal remedies for default. Those are real remedies and should be acknowledged.

They do not answer the specific problem created by Section 1.05. If project contingencies fail, the agreement terminates and the parties have no further obligations, but the agreement does not say what happens to meters already issued or capacity already committed under Section 7. It provides no meter-specific clawback, suspension mechanism, substitute-source covenant, repayment provision, escrow, performance bond, or letter of credit.

The testimony should not assume, without DWS rules and customer-specific facts, that DWS necessarily has an irrevocable legal duty to continue every service. The narrower and supportable point is that the contract fails to allocate that risk and invites operational or legal disputes if the project fails.

10. The 90-day deemed-approval clauses create avoidable engineering and acceptance risk.

Agreement Section 3 deems material plan deviations approved if DWS does not approve or disapprove them with a reasonable explanation within 90 days. Section 4 similarly deems the completed work approved if written disapproval is not received within 90 days.

These provisions are not inherently unlawful, and they do not replace independent CWRM, Department of Health, or other regulatory approvals. They nevertheless expose the County to

contractual approval by silence for critical public infrastructure. DWS's final engineering and construction acceptance should be affirmative, written, and based on a complete submittal. At minimum, the clock should not begin until DWS confirms in writing that the submission is complete, and it should toll while requested information or corrective work is outstanding.

11. Amendment, extension, and future-expansion authority must be narrowed.

Bill 97 authorizes amendments consistent with the agreement's purpose and scope if they do not increase the County's financial obligation or duration. Agreement Sections 1.05, 10.06, and 11.02 permit extensions for force majeure, DWS action or inaction, or mutual written agreement.

The bill's authorization and the agreement's extension language are not necessarily irreconcilable. A force-majeure extension may operate under the original contract, while a mutually agreed extension that increases duration appears to fall outside Bill 97's delegated amendment authority. The problem is that the text does not say so clearly, and the County's financial baseline has not been quantified.

The agreement also reserves all capacity produced by future expansion and promises source credits of "not less than" 1.728 million gallons per day without defining who may approve, fund, or operate an expansion. **Bill 97 should be amended to require new Council authorization for any material change to capacity, advanced meters, source-credit quantity or priority, use restriction, County cost, remedies, license term, or project deadline.**

12. The future perpetual license remains a separate Council decision.

Agreement Section 5 correctly states that the future license of the well and tank sites, transmission pipeline, easements, and improvements is subject to later Council approval under Maui County Code Chapter 3.44. Bill 97 should expressly state that it does not approve that future license.

Before acceptance, the Council should receive the actual license; title, easement, lien, and encumbrance information; as-built plans; regulatory approvals; inspection and testing records; warranties; environmental and historic conditions; insurance and indemnity terms; and a physical-condition and lifecycle-cost assessment.

13. The Water Board's role is advisory, but its unresolved record concerns remain relevant.

Charter Section 8-11.3 makes the Board of Water Supply an advisor to the DWS Director, Mayor, and Council. Board approval is not a legal condition precedent to Bill 97.

The Board's June 6, 2025 letter nevertheless asked for the basis of the production estimates, aquifer and neighboring-well effects, pumping and electrical costs, annual operating costs, and a

Community Plan explanation. Some defects in the older draft were later addressed: the current packet includes maps and expressly requires compliance with DWS construction standards. But the packet still does not supply the requested yield, aquifer, cost, and plan analyses. On October 16, 2025, the Board voted 6-0 to defer further discussion because questions remained.

Requested action

I respectfully request deferral until:

Bill 97 and Agreement Section 12 identify the same instrument and the same ordinance-approval method, and the exact execution copy is fixed.

DWS supplies the source, aquifer, interference, water-quality, and sustainable-production analyses supporting the promised capacity.

DWS provides annual and lifecycle cost, treatment, replacement, and ratepayer-impact estimates and establishes a financial baseline for future amendments.

The Planning Department and Corporation Counsel provide a written reconciliation with the Upcountry Community Plan.

The record documents public-trust consideration and the agreement preserves continuing public-trust and regulatory authority.

DWS, DHHL, and Corporation Counsel provide a written Chapter 343 timing determination, and Chapter 6E and cultural-review milestones become enforceable conditions.

Advanced meters are tied to issued regulatory permits and protected by a project-failure remedy and adequate performance security.

Deemed approvals are removed or replaced with a complete-submittal, tolling, and affirmative-written-acceptance process.

Material amendments, mutual extensions, and future capacity expansion return to the Council.

The Board of Water Supply reviews the completed record and submits a public recommendation, recognizing that its role is advisory.

Deferral is not opposition to DHHL beneficiaries. It is a request to make this agreement technically supportable, financially transparent, and legally durable before the County and DHHL rely on it.

Mahalo,

Edward Codelia