

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division



MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: January 23, 2020

SUBJECT: First Draft of Report #46, Possession of an Open Container of Alcohol

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #46, Possession of an Open Container of Alcohol.¹

COMMENTS ON THE DRAFT REPORT

RCC § 25-1001. POSSESSION OF AN OPEN CONTAINER OR CONSUMPTION OF ALCOHOL IN A MOTOR VEHICLE

RCC § 25-1001 (a) (2) makes it illegal to possess or consume an alcoholic beverage: “In the passenger area of a motor vehicle on a public highway, or the right-of-way of a public highway.” The term “public highway is defined in RCC §22E-701 by referencing 23 U.S.C .§ 101(a).

Subparagraph (11) of the federal law states:

The term “highway” includes—
(A) a road, street, and parkway;

¹ This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

(B) a right-of-way, bridge, railroad-highway crossing, tunnel, drainage structure including public roads on dams, sign, guardrail, and protective structure, in connection with a highway; and

(C) a portion of any interstate or international bridge or tunnel and the approaches thereto, the cost of which is assumed by a State transportation department, including such facilities as may be required by the United States Customs and Immigration Services in connection with the operation of an international bridge or tunnel.

There is no reason, however, to incorporate federal law into a provision dealing with alcohol in a motor vehicle when District law already has defined “highway” in our driving while impaired statutes. Having two definitions of “highway” when dealing with a person operating a motor vehicle with an open container or while consuming alcohol, is unnecessary and adversely affects the clarity of District law. D.C. Code § 50-1901 (6) states:

“Highway” means any street, road, or public thoroughfare, or the entire width between the boundary lines of every publicly or privately maintained way, when any part thereof is open to the use of the public for purposes of vehicular or pedestrian travel.

The following example highlights this issue. A person is drinking alcohol in her car in a McDonalds parking lot. Drinking vodka in a car in a McDonald’s parking lot is just as dangerous as drinking on a street. It is unclear from the text of 23 U.S.C .§ 101(a) whether the parking lot is a highway.² However, under District law it is clear that such behavior is prohibited as the parking lot is a privately maintained way that is open to the use by the public for purposes of vehicular or pedestrian travel. Therefore, OAG recommends that the definition of “highway” in RCC §22E-701 be amended to reference D.C. Code § 50-1901(6).

RCC § 25-1001 (b) contains exclusions from liability. It states:

- (1) A person shall not be subject to prosecution under this section for conduct in a vehicle that operates on rails.
- (2) A person shall not be subject to prosecution under this section if that person is:
 - (A) Located in:
 - (i) The passenger area of a motor vehicle designed, maintained, or used primarily for the transportation of persons for compensation; or
 - (ii) The living quarters of a house coach or house trailer; and
 - (B) Not operating the motor vehicle.

² It is unclear because, though the federal statute does not specifically mention a privately maintained way that is open to vehicular traffic, it utilizes the word “includes.”

RCC § 25-1001 (b)(1) categorically excludes from prosecution anyone who is in a vehicle that operates on rails. While OAG does not oppose that exclusion when it comes to passengers, we do not believe that it should reach people who operate or are in physical control of trains, including METRO trains. Person's who operate, or who are in physical custody of trains, should be subject to the offense like people who operate, or who are in physical control of, a motor vehicle.

RCC § 25-1001 (b)(1)(B) excludes from prosecution someone who is not operating a motor vehicle. While it is certainly a safety matter that a person who is operating a motor vehicle not consume an alcoholic beverage or be in possession of an open container of an alcoholic beverage, it is equally a safety matter that a person who is in physical control of a motor vehicle not consume an alcoholic beverage or be in possession of an open container of an alcoholic beverage. That's why D.C. Code § 50-2206.11, the DUI statute provides:

No person shall operate or be in physical control of any vehicle in the District:

- (1) While the person is intoxicated; or
- (2) While the person is under the influence of alcohol or any drug or any combination thereof. [emphasis added]

In light of the DUI statute and the safety issues involved with alcohol use in cars, OAG recommends that the exclusion found in (a)(2) (B) be amended to state "Not operating or being in physical control of the motor vehicle."

While OAG does not oppose the Commission's proposals to decriminalize open container of alcohol outside of a vehicle and public intoxication due to alcohol, we would note that this runs counter to the Council's apparent desire to treat marijuana use the same as alcohol. Therefore, should Congress lift the restrictions that it has placed on the ability of the District to further decriminalize marijuana, OAG suggests that the Council consider whether the laws prohibiting the public consumption of marijuana and public intoxication due to marijuana be decriminalized to the same extent recommended in this proposal.