

# **PUBLIC DRINKING ARRESTS BY MPD OFFICERS ON RESIDENTIAL PROPERTY**



## **REPORT AND RECOMMENDATIONS OF THE POLICE COMPLAINTS BOARD**

**TO**

**MAYOR ADRIAN M. FENTY,  
THE COUNCIL OF THE DISTRICT OF COLUMBIA, AND  
CHIEF OF POLICE CATHY L. LANIER**

**August 17, 2009**

## **POLICE COMPLAINTS BOARD**

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## **I. INTRODUCTION AND OVERVIEW**

Members of the public have filed complaints with the District of Columbia's Office of Police Complaints (OPC) alleging that Metropolitan Police Department (MPD) officers have arrested them for "Possession of an Open Container of Alcohol" (POCA), a criminal offense in the District that prohibits drinking alcoholic beverages (or possessing open containers of alcohol) in public places, even though at the time of their arrests, the complainants were consuming alcohol outdoors on private, residential property. Two of the complaints involved persons arrested for consuming alcohol while attending a backyard barbecue held inside a fenced backyard, which later was determined to be private property not subject to the District's POCA law.

In Washington, D.C., many private, residential properties, particularly in older neighborhoods such as Capitol Hill, are abutted by strips of public land called "parking," which usually consists of front yard or front driveway space that residential property owners may use pursuant to an easement, but which remains public land. The POCA statute permits alcohol consumption on residential structures that project onto "parking," such as front porches, terraces, and bay windows, provided the homeowner consents. However, POCA prohibits alcohol consumption on land identified in the District's property records as "parking," even when such land is used as and appears indistinguishable from private, residential property.

In the course of investigating the complaints noted above, OPC learned that MPD officers lack clear guidance on how properly to enforce POCA on residential property. Some MPD officers stated that they have been trained to believe all backyards in the District of Columbia are public property subject to POCA arrests. Other officers have the impression that in the District, all residential yard space is public property subject to POCA. Both views are inaccurate and create the potential for continuing unlawful POCA arrests. Still other officers complained that they have received no training regarding what constitutes "parking" or how to enforce POCA on public property that adjoins, resembles, and is used as private, residential property.

Further investigation revealed that some MPD officers' confusion about the proper reach of the POCA statute is attributable not only to lack of clear, accurate MPD directives and training regarding where "parking" begins and ends, but also to the inherent difficulty of enforcing a statute that essentially requires police officers to have detailed knowledge of or ready access to District of Columbia land records.

Although the number of complaints received was small, the discovery that some MPD officers have been improperly trained to believe all residential yard space or all residential backyard space in the District is public property subject to the POCA law indicates that the potential for ongoing arbitrary and unlawful enforcement of POCA (even if infrequent) is real. Given the importance of the Fourth Amendment rights at stake, the Police Complaints Board (PCB), OPC's governing body, determined that this issue warrants addressing.

Accordingly, to eliminate improper enforcement of POCA, PCB recommends that MPD develop a POCA general order and corresponding officer training that, while covering all aspects of POCA enforcement, gives special attention to residential enforcement in order to correct

officers' understanding of where such arrests may lawfully be made and to guard against violations of important residential civil rights. In particular, the POCA directive and related training should : a) clarify what constitutes "parking," b) explain that not all residential yard space in the District is public property subject to POCA arrests, c) make clear that most backyards in the District, even in areas where "parking" is prevalent, do not constitute "parking" and thus are not subject to POCA arrests, and d) emphasize that where there is doubt as to whether residential property constitutes "parking," POCA arrests should not be made.<sup>1</sup>

PCB further recommends that the D.C. Council consider amending the District's POCA statute to exempt from the list of public places to which the law applies "parking" that adjoins and is used as private, single-family, residential property. Such an amendment may be appropriate because "parking" that is used as private, residential yard space differs in character from other public spaces such as streets, alleys, sidewalks, and parks, and, therefore, exempting it from POCA enforcement would not appear to hinder accomplishment of the POCA law's ultimate purpose of eliminating quality of life problems associated with public drinking in places used by the general public. PCB does not make this recommendation to promote or expand public drinking, as it is well aware of District residents' need and desire for a law that, to the greatest extent possible, protects against diminution of quality of life. Rather, PCB's investigation of this issue has revealed that it is the POCA law's application to "parking" that is the source of POCA arrests on residential property. Furthermore, it appears the practical difficulty of accurately identifying "parking," – given that its parameters are defined by District land records and it varies from one neighborhood to another – increases the risk of arbitrary and unlawful residential POCA enforcement. PCB believes that reducing opportunities for arbitrary and unlawful enforcement of the law will promote greater public confidence in the police and ultimately lead to greater respect for and compliance with District law.

## II. SUMMARY OF THE DISTRICT'S POCA STATUTE

The District of Columbia, seeking to eliminate public intoxication and its attendant problems, long has proscribed drinking of alcoholic beverages in public. In 1934, following the repeal of Prohibition, the District's Alcoholic Beverage Control Act was passed.<sup>2</sup> It provided that "[no] person shall in the District of Columbia drink any alcoholic beverage in any street, alley, park, or parking ...."<sup>3</sup> In 1985, the District of Columbia Council amended the law by adding possession of an open container of alcohol.<sup>4</sup> The Report of the Council's Committee on

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<sup>1</sup> PCB is making these recommendations pursuant to D.C. Official Code § 5-1104(d), which authorizes the Board to recommend changes to the Mayor, the Council of the District of Columbia, and MPD's Chief of Police if the reforms have the potential to reduce the incidence of police misconduct. PCB is grateful to the following OPC staff who assisted in preparing this report and accompanying recommendations: OPC's executive director, Philip K. Eure, who supervised the project; special assistant, Nicole Porter; attorney Angela Kiper; 2008 summer law clerk, Emily Snider (University of Florida, Levin College of Law); and 2009 summer law clerk, Zachary Oseland, (Duke University School of Law).

<sup>2</sup> See *Alvarez v. United States*, 576 A.2d 713, 716 (D.C. 1990) (discussing legislative history of the District's POCA statute).

<sup>3</sup> *Id.* at 716 (quoting District of Columbia Alcoholic Beverage Control Act, 48 Stat. 319, 333 (1934)).

<sup>4</sup> *Id.* at 716.

Consumer and Regulatory Affairs explained that possession of an open container of alcohol was added to the District’s public-drinking law in response to complaints from across the city expressing frustration at being unable to deter loitering by persons holding open containers of alcohol because the law originally applied only to persons observed in the act of drinking alcohol.<sup>5</sup>

Although amended several times since 1985, the District’s current POCA law, D.C. Official Code § 25-1001, remains remarkably similar to the original 1934 act. Located in Chapter 10 of Title 25 of the D.C. Official Code (the title governing all alcoholic beverage regulation in the District), it states in relevant part:

(a) [N]o person in the District shall drink an alcoholic beverage or possess in an open container an alcoholic beverage in or upon any of the following places:

(1) A street, alley, park, sidewalk, or parking area; . . . .

The term “parking” or “parking area” contained in subsection (a)(1) of the POCA act does not have its ordinary modern meaning and thus does not refer to a place, such as a parking lot, where motor vehicles are temporarily housed. Rather, “parking,” as used in the POCA statute, is a 19<sup>th</sup> century term that refers to green areas or “parks,” created with land left over from streets and walkways planned for the District by Pierre L’Enfant in 1791 and built (albeit narrower) in the 1800s. Homes constructed at the time were built directly on the owners’ property lines with little or no front yard space. However, as a result of the District’s “parking,” these homes have public green areas situated between the homeowner’s property line and the edge of the street or sidewalk. In the late 1800s, Congress passed several acts that granted homeowners whose properties were adjoined by “parking” the right to use this District-owned space. Pursuant to the congressional acts, homeowners were permitted to build porches, bay windows, and corner towers that sit or project upon “parking” and underground vaults or cellars that extend into “parking” from below.<sup>6</sup> Owners of such homes effectively were granted an easement allowing them to treat the abutting public property as residential property for their use and enjoyment, an arrangement that continues today and that applies to other homes which were built later but which are adjoined by “parking.”<sup>7</sup>

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<sup>5</sup> *Id.*

<sup>6</sup> For a detailed discussion of the 19<sup>th</sup> century congressional acts that gave District property owners the ability to use “parking” that abuts their property, see *Yours, Mine, and Ours: Front Yards and other Public Space on Capitol Hill*, Capitol Hill Restoration Society Guidelines (Capitol Hill Historical Society, Washington, D.C.), June 1996, available at [www.chrs.org/documents/Guidelines/06\\_CHRS\\_PublicSpace.pdf](http://www.chrs.org/documents/Guidelines/06_CHRS_PublicSpace.pdf).

<sup>7</sup> Note, however, that under District law, a property owner’s use of the parking is not absolute. For example, although homeowners are allowed to plant flowers, hedges, and trees on the parking, see, e.g., D.C. Mun. Regs. tit. 24, §§ 102, 2001 (2008), they are not allowed to keep litter there, or store vehicles there without a permit. See D.C. Mun. Regs. tit. 24, §§1001.1, 101.5.

Despite being allowed to use “parking” to access homes and even to expand living space, District residents were for a time subject to arrest for consuming alcohol while in or on bay windows, porches, or other structures that extend into “parking.” Recognizing that POCA arrests should not be made on residential structures that legally sit upon District-owned land, the District Council in 1999 amended the POCA statute to explicitly exempt from the statute’s prohibitions residential structures that project onto “parking.” The relevant provision states:

(b) Subsection (a) (1) of this section shall not apply if drinking or possession of an alcoholic beverage occurs:

(1) In or on a structure which projects upon the parking, and which is an integral, structural part, of a private residence, such as a front porch, terrace, bay window, or vault;” and

(2) By, or with the permission of, the owner or resident.<sup>8</sup>

To provide further clarity, the Council’s 1999 amendments included a definition of “parking” in D.C. Official Code § 25-101(36), which states:

“Parking” means that area of public space which lies between the property line and the edge of the actual or planned sidewalk which is nearer to such property line, as such property line and sidewalk are shown on the records of the District.

It is unclear whether in 1999 the Council also considered whether “parking” that adjoins and is used as private, residential property should be exempt from the POCA law. In any event, as the law currently stands, persons can be arrested in the District for drinking alcohol or possessing open containers of alcohol while on land that constitutes “parking,” as distinct from being on a residential building structure that overhangs or sits upon parking.

### **III. CURRENT MPD POLICY AND TRAINING ON THE POCA STATUTE**

MPD’s only directive addressing enforcement of the POCA statute is a December 20, 1999, memorandum entitled, “District of Columbia Code Change.” The memorandum notifies MPD officers that effective March 26, 1999, the District’s POCA statute was amended to exempt residential structures that project upon “parking” from the statute’s prohibitions. The language that amends the statute is quoted verbatim. The memorandum also notes that the term “parking” is now defined in Title 25 of the D.C. Official Code, and it sets forth the exact language of the definition. The memo clearly seeks to inform officers that certain conduct previously subject to arrest -- in particular, drinking or possessing open containers of alcohol on residential structures that overhang or project onto “parking” -- is no longer an offense, and therefore officers are no longer authorized to make arrests in such circumstances. However, the introduction to the memorandum includes a statement which implies that MPD officers may have in the past improperly broadened the reach of POCA. It states: “Police officers have in the past arrested persons with opened alcoholic beverages, regardless of where the persons were at the time of the

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<sup>8</sup> See D.C. Official Code § 25-1001 (b).

violation . . . .” The statement implies that some MPD officers believed it a violation of POCA to possess an open container of alcohol outside, irrespective of where a person was. If that view has continued, it might explain the confusion of some officers on this subject.

During its investigation of complaints stemming from POCA arrests, OPC interviewed the MPD officers involved in the arrests and MPD training officials to determine what officers are taught about POCA and what their understanding is of where a residential POCA arrest may properly be made. According to MPD’s Director of Academic Services, the training each recruit officer receives with regard to POCA is a copy of the D.C. Code and an overview of what it contains. POCA is “at best, touched on only briefly as there are so many other laws.”<sup>9</sup> Some of the officers involved in the arrests stated that they were taught all backyards in the District are public property. One officer specifically noted that he was trained to think alcohol consumption in any District backyard is illegal. Other officers involved in the arrests stated that they had received no training at all on the POCA law. An MPD training official stated that his understanding is that an individual’s private property stops at the threshold of his or her home, and public space extends from “building line to building line.” This official added that his understanding is that an individual may drink on his or her front porch or bay window, if the structure extends beyond the individual’s property line. Overall, it appeared there was no consensus within MPD as to where “residential” POCA arrests may legally be made.

Based on its review of MPD training materials, interviews with officers, and investigation of the complaints filed with OPC, PCB concludes that MPD officers are not receiving adequate training regarding when and where arrests for violation of POCA may legally be made, particularly in the residential context. It appears that MPD officers are not taught that “parking” does not constitute the lawns of all District residences. In older areas of the District, such as Capitol Hill, where homes were built up to the owners’ property lines, significant front yard space may be “parking,” subject to POCA. However, in newer areas of the District, pursuant to zoning requirements, homes are set back several feet from the property line, and surrounding yard space is part of the homeowner’s private property. Despite this important fact, it appears MPD officers are not being advised of the distinction, resulting in uncertainty, confusion, and possibly unlawful POCA arrests.

#### **IV. LEGAL CONCERNS**

The purpose of the District’s POCA statute is to preserve and promote the peace, safety, and enjoyment of public space throughout the city by reducing to the greatest extent possible problems associated with public drinking that diminish quality of life. Accordingly, applying the statute to such public places as streets, alleys, parks, and sidewalks undoubtedly promotes the law’s purpose. However, extending the statute’s prohibitions to “parking,” as that term is defined in D.C. Code §25-101(36), is problematic. Although “parking” technically is public land, given that it generally constitutes yard space of private residences, it is not a place to which the general public has unrestricted access or a place generally used by the public, which is the standard used by courts in other jurisdictions to determine the proper reach of public intoxication

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<sup>9</sup> E-mail from John Foust, MPD Director of Academic Services to Keshia Taylor, OPC Chief Investigator (April 7, 2008).

laws. For example in Washington state, the courts have held that an open backyard patio of a private residence and common walkways of an apartment building are not public places where arrests for public intoxication legitimately may be made because these are places to which the public does not have unrestricted access or places not generally used by the public.<sup>10</sup>

It also should be noted that yard space around private residences is given special protection under the Fourth Amendment's "curtilage" doctrine, pursuant to which persons have a reasonable expectation of privacy in the area immediately surrounding their homes and which is therefore protected from unreasonable search and seizure.<sup>11</sup> Police officers therefore may not enter the yard space immediately surrounding a home to make an arrest without a warrant unless circumstances that constitute an exception are present.<sup>12</sup>

PCB recognizes that the legal principles alluded to above are not directly applicable here because "parking" is District-owned, public land. However, "parking" that adjoins and is allowed to be used as single-family, residential property is arguably analogous to private, residential property. Accordingly, legal protections afforded such property perhaps should be extended to single-family, residential "parking."

Beyond the fact that "parking" used as residential yard space is analogous to private, residential property, the POCA law's application to "parking" may be subject to constitutional challenge as void for vagueness. Where a criminal law either fails to provide adequate notice to citizens regarding what conduct is proscribed or fails to provide clear standards to those, such as police officers and judges, who must enforce the law, the risk of arbitrary application renders the law void for vagueness.<sup>13</sup> The POCA statute purports to be clear in defining "parking" as the area of public space between a private property owner's property line and the edge of the actual or planned sidewalk nearest to the property line as shown in the District's land records. However, in order to conclusively determine this, MPD officers would need to have perfect knowledge of voluminous land records or the ability to consult such records during the course of field assignments, a requirement that is impractical and arguably unreasonable. The difficulty of determining where relevant property lines begin and end thus increases the likelihood of arbitrary enforcement.

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<sup>10</sup> See, e.g., *State v. S.E.*, 954 P.2d 1338, 1340 (Wash. Ct. App. 1998) (for purposes of public intoxication law, "public place" does not include the back patio of a residence or the common area walkway in an apartment complex); see also *Moore v. State*, 634 N.E.2d 825, 827 (Ind. App. 1994) (a driveway or backyard is not a "public place" where one can be arrested for being intoxicated because it is part of a private residence, which includes the grounds surrounding the residence).

<sup>11</sup> See, e.g., *Oliver v. United States*, 466 U.S. 170, 180 (1984). For a definition of "curtilage," see BLACK'S LAW DICTIONARY (8<sup>th</sup> ed. 2004) (defining "curtilage" as the "land or yard adjoining a house).

<sup>12</sup> *Oliver*, 466 U.S. at 180.

<sup>13</sup> *Chicago v. Morales*, 527 US 41, 52 (1999).



## VI. CONCLUSION AND RECOMMENDATIONS

PCB's investigation into complaints filed with OPC alleging that persons have been improperly arrested for violations of POCA on residential property has revealed that MPD officers lack accurate and complete knowledge regarding when and where they may make POCA arrests on residential property. Specifically, some officers appear wrongly to believe that in the District of Columbia, either all backyards or, in some instances, all yard space surrounding residential properties constitute public property subject to POCA. Officers also lack clear understanding of the concept of "parking," a form of public property subject to POCA which is commonly used as residential property but which can be difficult to identify accurately in the absence of property records. PCB's findings reveal a clear need for MPD to take action to properly educate its officers about how legally to enforce POCA in the residential context. At the same time, PCB's findings raise the question whether "parking" that is lawfully used as residential property should be included on the list of public places to which the District's POCA law applies. To guard against improper POCA arrests on residential property, PCB recommends the following:

- 1.) MPD should develop a new POCA general order and corresponding recruit and in-service POCA training. Although the general order and training should cover all aspects of POCA enforcement, special emphasis should be placed on how properly to enforce POCA in the residential context, since this is the area of greatest confusion and the one that presents the greatest potential for civil rights violations, given the primacy of the right of citizens to be free of government intrusion in and around their homes. At a minimum, the new directive and the attendant training should ensure that MPD officers know:
  - a.) Not all residential yard space in the District of Columbia is public property; therefore, not all District yards are subject to POCA;
  - b.) Most backyards are not subject to POCA, even in neighborhoods where "parking" abuts front yards;
  - c.) The front yards of many residential properties adjoined by "parking" consist both of "parking" and privately owned land, and arrests for POCA are not sanctioned on the part of a yard that is not "parking;" and
  - d.) If it is unclear whether residential yard space is "parking," POCA arrests should not be made.

In developing its POCA directive and training, MPD may wish to consult other District agencies such as the Recorder of Deeds and the Department of Public Works (which administers many regulations applicable to "parking") for assistance accurately defining, describing, and assisting officers to identify residential properties adjoined by "parking." The general order and

the training should pinpoint those District neighborhoods and communities where residential properties include “parking” and, to the extent possible, should clarify which portions of the yard or lawn area around such residences constitute “parking.” Similarly, any neighborhoods or communities with little to no “parking” should be identified and highlighted. The POCA directive and training should also remind officers of important constitutional rights that apply to residential property and the land that immediately surrounds it, and explain how POCA enforcement on residential property implicates these rights.

- 2.) The District of Columbia Council may wish to consider amending the District’s POCA statute to exempt “parking” that is used as private, single-family, residential property from the list of public places subject to POCA’s prohibitions for the following reasons:
  - a.) “Parking” that adjoins and is allowed to be used as single-family, residential property, although technically public land, is not a place to which the public has unrestricted access and is not used by the general public in the way streets, alleys, sidewalks and parks are used;
  - b.) Given the non-public character of “parking” that adjoins and is used as single-family, residential property, removing it from the list of public places to which the POCA law applies would not undermine the law’s overarching purpose of prohibiting alcohol consumption and intoxication in places used regularly by the general public; and
  - c.) Including “parking” that is used as residential property on the list of public places to which the POCA law applies increases the risk of arbitrary and unlawful POCA enforcement, given that lawful enforcement requires MPD officers to know or consult District land records, and this may be an unreasonable administrative burden.

Recognizing that some property identified as “parking” in the District’s land records currently adjoins commercial or other non-residential, private property, PCB wishes to clarify that its suggestion that the Council consider the propriety of exempting “parking” from the District’s POCA law is limited only to “parking” that adjoins and is used as single-family, residential property.