Note: What's presented below is a legal analysis of an OMA noticing violation for a meeting of the Ann Arbor Historic District Commission on Nov. 30, 2010, that could form the basis for a court to invalidate a decision made by that body. The analysis, prepared by The Ann Arbor Chronicle consulting with local attorneys, is written to be accessible to non-attorneys.

Basic Facts

The city of Ann Arbor's historic district commission (HDC) met for a special meeting on Nov. 30, 2010. At that meeting, the HDC deliberated and voted on a resolution to extend a consent agreement that settled the lawsuit filed by the developer of the Glen Ann Place project, which had been approved by the Ann Arbor city council in 2005, but denied approval by the HDC. Notice of the special meeting on Nov. 30, 2010 was attempted by publication in the Washtenaw Legal News and by pinning a paper notice to a tack strip in the lobby of the Ann Arbor city hall.

Invalidation of Decisions Under Michigan's OMA

The Michigan Open Meeting's Act statute provides for invalidation of a decision if two conditions are met: (1) a failure to give notice in accordance with MCL 15.265 Section 5 has interfered with substantial compliance with the core sections of the act – that meetings, decisions, and deliberations of public bodies must be open; and (2) a court finds that the failure has impaired the rights of the public under the act.

Posting Requirement: Not Met Based on City's Criteria

So MCL 15.265 Section 5 is the relevant passage of the OMA statute to consider. Section 5, in subsection (6), requires that for a special meeting of a public body like the one held on Nov. 30, 2010, a public notice stating the date, time, and place of the meeting be posted at least 18 hours before the meeting.

Where must the public notice be posted? For this question, it's Section 4 that provides guidance: "A public notice for a public body shall always be posted at its principal office and any other locations considered appropriate by the public body." In the case of the HDC, the city hall building is considered to house its principal office.

In the case at hand, the city has not refuted the contention that it failed to post a notice in the locked glass display case in the lobby of city hall for the Nov. 30, 2010 special meeting of the HDC. Instead, the city contends that its notice was posted on a tack strip. The tack strip is located down a hallway from the glass display case, and not readily visible from the area where the glass display case is mounted.

The legal question, then, is whether posting a notice on the tack strip satisfies the statutory requirement that the city post a notice at the public body's principal office. Clearly, the statute does not specify that a notice be posted in a locked glass display case. And clearly the statute does not rule out posting a notice on a tack strip as a way to satisfy the requirement. Nor does the letter of the statute indicate that the specific location must meet any particular physical

criteria.

Certainly one could construct various arguments why, when judged by objective physical criteria, the tack strip is not an appropriate location for posting meeting notices, and why the display case, on the other hand, is appropriate. For example, the tack strip is completely insecure – a posting could be removed by any member of the public during the period it's required to be posted. Or a gust of wind from an open doorway could blow a posting away.

However, the language of the statute itself appears to give a public body some discretion to determine appropriate specific locations for posting notices of meetings. So the question is left, in part at least, to the public body to decide what an appropriate specific location is for posting notices at the principal public office of the public body, and certainly the public body's own view matters in judging whether a location is appropriate.

It is our contention that the city's own view about specific posting locations within city hall is clear, namely: The tack strip is not an appropriate location for posting meeting notices, when such posting is required by the OMA statute. That contention is based on an email sent by the city clerk to all relevant staff at the city on Aug. 19, 2009 in which she reminds staff that they need to contact the city clerk's office to post any required notices in the glass display case, and further, that the tack strip [which she references as the "cork board"] "should only be utilized for notices that do not pertain to city boards and commissions." [The city provided a copy of the clerk's Aug. 19, 2009 email in response to a FOIA request made by The Chronicle.]

This issue of the tack strip is not new to the city. The Aug. 19, 2009 city clerk email was prompted by a complaint from AnnArbor.com about the use of the tack strip to post meetings. Ed Vielmetti, writing for that publication as its lead blogger, wrote two posts in that general time frame, the first on Aug. 19, 2009 laying out his own experience missing a meeting due to posting on the tack strip. [See "Open Meetings Act and the required public posting of notices" and "On looking for a public meeting notice and not finding it"]

One can speculate that the city's policy view about the appropriateness of the tack strip is based on the kind of considerations we've alluded to already – security, for example – but for present purposes, it doesn't matter what the city's basis for its policy is, only what the policy is.

Our contention about the city policy is further supported by an interview The Chronicle conducted by phone with the Ann Arbor city clerk on Dec. 20, 2010, when she indicated that the tack strip is not currently considered appropriate for posting meeting notices, and not intended for use by staff to post meeting notices of city boards and commissions. She further indicated that staff discussions had taken place about un-installing the tack strip, to prevent staff from inappropriately posting meeting notices there. She indicated that the intended purpose of the tack strip is to provide members of the public, not city staff, with a location where they can post legal notices, especially those that contain multiple pages.

So the city did not meet its statutory obligation to post a notice for the Nov. 30, 2010 HDC

meeting at the HDC's principal offices, because the city itself does not believe that the tack strip is an appropriate location for posting meeting notices if they're required by the statute.

Posting Requirement: Not Met Based on Accessibility

For a court to find that the city did satisfy the posting requirement for the Nov. 30, 2010 meeting of the HDC, it would require an interpretation of the statute that allows the staff of a public body to establish for the public a reasonable expectation – through labeling, past practice, and its own policies – that meeting notice postings will appear at one particular location, but also allows staff, on some occasions, to deviate from that specific posting location, to include even such deviant posting locations that are deemed by the public body itself to be an inappropriate posting location.

Further, to find that the city did satisfy the requirement would require an interpretation of the statute that holds that the posting requirement is satisfied, no matter what specific location at the principal offices is chosen on a particular occasion to give notice of a particular special meeting.

So, is it reasonable to contemplate some basic notion of "accessibility" of a specific location at the principal offices? The idea would be that a posting location must be "accessible," in order for the posting requirement to be satisfied. It seems like a good idea; but is it reasonable to interpret the OMA statute that way? After all, the statute itself does not explicitly discuss accessibility of locations. In fact, Opinion 5724 of the Michigan state attorney general articulates a notion of accessibility – in connection with the need to provide continuous access to a special meeting notice for the entire 18-hour period before the meeting.

In passing, it's worth noting that it's not clear that the current arrangement during city hall construction/renovation allowed continuous access to the Nov. 30, 2010 posting – because it's confusing to many people how to gain access to the building after hours, and there have been reports of people getting no response after pressing the button that alerts the police desk that someone would like to enter the building.

The suggestion in Opinion 5724 – that the requirement on notices of special meetings may be met by posting the notice outside the main entrance to the building – is instructive. It tells us that accessibility is an appropriate notion to apply, even though the statute does not explicitly say anything about a notice needing to be accessible. In reaching that conclusion, the attorney general reasoned from the basic rule that "the spirit and purpose of a statute should prevail over its strict letter."

So Opinion 5724 concludes that the purpose of the OMA statute is served only when a special meeting posting is placed in a location that is physically accessible and visible for the whole 18-hour period before the meeting. The specific situation contemplated by the attorney general in that opinion is a situation where the building is locked for the entire 18-hour period, preventing anyone from having access. So the attorney general contemplates a remedy for a locked building that would make the notice visible from outside the main entrance of the building.

Only slightly extending that reasoning leads us to the conclusion that the purpose of the OMA statute is served only when a special meeting posting is placed in a location that is accessible in the sense that a reasonable person could be reasonably expected to consider looking in that location for a notice of a public meeting.

But the tack strip is not accessible in that sense. Consider the configuration of the glass display case, located immediately to the left of the current building entrance and established by the city's habit and practice as the expected location for meeting notices. The tack strip is located several feet away and is not readily visible from the area where the display case is mounted. The display case includes large labels, legible from several feet away, for various public bodies' meeting schedules – implicating, even for members of the public who are not aware of past practice, that this place is the appropriate spot to look for meeting notices.

There is no signage in the area of the glass display case to suggest that there are other locations where public meeting notices might be posted. So if a member of the public were to verify that no posting of a meeting is displayed in the glass case, where most such notices are found, that member of the public would have no reason to continue to investigate other potential locations, especially not those located a significant distance away like the tack strip. And members of the public would have no reason to investigate locations not readily visible from the glass display case, or alternate locations like the tack strip that are completely unlabeled in any way to suggest that notices of meetings for public bodies could be found there.

So it's clear that the tack strip does not meet a simple criterion of accessibility. It's not plausible to contend that most reasonable people would think to look at the tack strip for a meeting notice, given the existence of the glass display case, the lack of labeling on the tack strip, and its out-of-the-way location with respect to the building entrance.

Here's a specific illustration of the behavior of a reasonable person with respect to the tack strip – if a member of the HDC can be taken to be a reasonable person. Responding to an email The Chronicle sent to him after the special meeting took place – a message indicating that The Chronicle was trying to find evidence that the HDC special meeting had been properly noticed – HDC member Patrick McCauley replied: "As for the evidence, hmmm... I know that public notification was discussed, but beyond that I'm not sure." From that expression of uncertainty on McCauley's part, it's apparent that McCauley did not observe the special meeting notice that the city contends was posted on the tack strip – and McCauley would have needed to walk directly past it in order get to the special meeting location.

So, if the actions of a member of the HDC itself may be taken as representative of reasonable behavior by a reasonable person, then it's not clear how to argue that a reasonable person would think to look at the tack strip, or otherwise have a reason to observe the notice that the city contends was affixed to the tack strip.

Driving home the point that postings of meeting notices on the tack strip are not accessible in

a relevant sense is the city clerk's email of Aug. 19, 2009, which specifically cites Vielmetti's complaint about "accessibility" of the tack strip as the reason for sending the message, a message that reminded staff that they are not supposed to post meeting notices on the tack strip. So it's fair to conclude the city has conceded that the tack strip is not accessible.

Conclusion: Posting Requirement Not Met

Based on the city's own criteria – plus the accessibility criterion, which the city has also embraced – it's clear that the posting requirement for the Nov. 30, 2010 special meeting of the HDC was not met.

It's important to note that a court would not need to find that anyone intentionally failed to post the meeting notice in the glass display case, or had any nefarious motive in doing so, in order for the court to find that the statutory requirement was not met. And certainly we're not contending that anyone intentionally failed to post the notice in the glass display case or had any nefarious motive in doing so.

Indeed, it's our understanding that the failure to post in the glass display case for the Nov. 30, 2010 special HDC meeting – described to us by an experienced city staffer as "we screwed up" – resulted from a failure to properly train a new staff member, who was apparently led, for whatever reason, to conclude that posting the meeting notice at city hall simply meant affixing it to the tack strip.

Failures to properly notice a meeting, even when they're the result of simple unintentional error, may constitute an impairment of the public's right under the statute.

Effect of Failure to Post: Impaired Public Right

But a failure of the city to meet its statutory obligation to post notice of a special meeting is not alone sufficient for a court to invalidate a decision made at that meeting. The question that must be weighed is whether the failure to post notice of a meeting "has impaired the rights of the public under this act."

In other words, the statute does not seem to be intended to provide citizens with a way to demand that a court invalidate decisions of public bodies based on a failure to post a meeting notice per se, without considering the actual effect of the failure to post a notice. For a decision to be invalidated, the statute seems to require a demonstration of some actual negative material effect on the public's ability to attend and observe an open meeting.

For situations like the Ann Arbor city hall's current construction/renovation configuration, it may be challenging to guarantee accessibility to postings of special meeting notices, but the statute ensures that even if accessibility to a posting is not provided, there would have to be some material effect of that inaccessibility in order for a decision to be invalidated.

Let's consider hypothetical cases when failure to post a notice in the glass display case at

city hall might be argued not to have a negative material effect, and therefore not truly have impaired the rights of the public under the statute. Suppose, hypothetically, that every resident of the city somehow finds out that a special meeting will be taking place, and that every resident attends the meeting. But suppose that no posting was made to the glass display case. In a scenario like that, it would be difficult, but perhaps not impossible, to contend that the rights of the public were impaired by the failure to post the meeting notice.

Or suppose, hypothetically, that it were possible to document with complete certainty that not a single resident in the city would have been interested in attending the meeting, even if they had known about it. On that hypothetical scenario, where posting a notice in a glass display case could not conceivably have had a material effect on anyone's attendance at a meeting, it could be difficult, but perhaps not impossible, to argue that the rights of the public would have been be impaired. This hypothetical case also shows that just because no one appears at a public meeting it does not necessarily follow that proper public notice wasn't given.

In the actual case, however, the failure of the city to post notice of the HDC's Nov. 30, 2010 special meeting in the glass display case had the effect that the city clerk's office was not notified of the meeting. In a Dec. 20, 2010 phone interview The Chronicle conducted with the city clerk, she explained that the way the city clerk is notified of special meetings is through requests from staff to post notices in the glass display case. It's necessary to contact the city clerk's office to gain access to the locked glass display case, because the city clerk's office holds one of two keys to the glass case. In the phone interview The Chronicle conducted with the city clerk on Dec. 20, 2010, she explained that only the city administrator's administrative assistant and the city clerk's office have a key to the glass display case.

In her Dec. 20, 2010 interview, the city clerk further explained that because her office was not contacted about posting the Nov. 30, 2010 HDC special meeting notice in the glass display case, her office was not made aware of the scheduled Nov. 30, 2010 special meeting of the HDC. In her Dec. 20, 2010 interview, the city clerk confirmed that because her office was not aware of the Nov. 30, 2010 scheduled HDC special meeting, this meant that the city clerk's office could not complete its assigned work tasks: (1) sending emailed meeting notices to those who have requested under the statute to be notified of special meetings at the same time they are posted; and (2) posting the meeting on the city's Legistar system on the city's website.

The city is not required under the statute to have this work assignment for the city clerk's office. But this is the way the city has determined to satisfy the statutory requirement of sending notices – by linking the sending requirement to the posting requirement. If the posting requirement fails to be met, the sending requirement also fails to be met. But if the posting requirement is met, the sending requirement will also be met.

If the posting requirement for the notice about the special HDC meeting had been satisfied, and the city clerk's office had thereby been given the opportunity to complete its assigned work task of satisfying the sending requirement, the clerk's office staff would have sent the meeting notice to The Chronicle, giving us the opportunity to attend the Nov. 30, 2010 special meeting. Further,

the city clerk's office staff would have added the meeting to the city's Legistar system on the city website and we would have seen it, because we checked the Legistar system on or around Nov. 28, 2010.

It's a fair question to ask, however, whether The Chronicle had any bona fide interest in attending that special meeting of the HDC. There are three clear pieces of evidence that The Chronicle did have such an interest, and would have attended the meeting – to report on it for our readers – if we had been sent the notice as required under the statute and if the city had listed the meeting on its Legistar system on its website:

1. We attended the Oct. 14, 2010 meeting of the HDC when the HDC decided to postpone the issue of the Glen Ann Place consent agreement extension. Our interest in attending the special meeting was based on the same interest we demonstrated in attending the regular HDC meeting on Oct. 14, 2010 – to report on an issue that's of interest to the public. At that meeting, it was decided that a special meeting would be called so that all commissioners could be in attendance for the decision – two were absent at the Oct. 14, 2010 regular meeting.
2. We emailed HDC member Patrick McCauley asking him to notify us when the time for the special meeting had been scheduled – in order to provide a second way to find out about the meeting time, in addition to the city clerk's emailed notification. [McCauley did not remember to notify us. But obviously he had no duty to do so. The point is simply that this affirms our interest in attending the meeting.]
3. On or around Nov. 28, 2010, The Chronicle checked the Legistar system, but did not see a listing for a special meeting for the HDC listed, because there was no such listing.

Conclusion: Right Impaired Through Failure to Post

In sum, the failure of the city to satisfy the statutory requirement of posting a meeting notice in a location it deems appropriate [the glass display case] had the specific material effect of preventing The Chronicle from knowing about – and thus preventing us from attending – the special meeting of the HDC on Nov. 30, 2010, as it was our desire to do.

Our right under the act to have access to the special meeting of the HDC was thus impaired – and as a result, the public's access to information about what transpired at that meeting, via our publication, was also impaired. This impairment was due to one of the possible grounds on which a court may invalidate a decision – failure to post notice of a meeting in a location the public body deems appropriate.

It's important to recognize that the statute does not say that to invalidate a decision based on a failure to post a meeting notice, the court would necessarily have to find that the impairment was due solely to the public's inability to physically see the meeting notice at its required location. Rather, the statute simply says that if the failure to post the notice has impaired the rights of the public, then it may invalidate the decision.

In the case at hand, we're dealing with a situation where the failure to post the meeting notice in an appropriate location had the consequence that other mechanisms of public notification were not triggered, mechanisms upon which members of the public rely for notice of meetings. Hence, the a court would in this case, have a clear basis on which to find that the failure to properly notice the meeting impaired the public's right under the OMA statute.

The impairment of our right was amplified by the fact that the public at large relies upon the reporting of The Ann Arbor Chronicle for an independent record of the meetings of various public bodies in the city.

It's our understanding that no audio or video recordings of the meeting were made. The only record now available are the staff notes made by Jill Thacher, which she was quite helpful in making available to us. Her notes, however, do not constitute an independent record of the meeting. It's thus not possible to cure the harm that was done to the public's right to have access to the meeting and its deliberations simply by examining other independent records, after the fact.

A court would therefore have adequate basis to invalidate the decision made by Ann Arbor’s historic district commission, made at its Nov. 30, 2010 special meeting, to extend the consent agreement on Glen Ann Place.