MEMBERS PRESENT: Chuck Gassman, Chairperson
Dave Kriens, Vice Chairperson
Bart Caldwell
Randy Tinker
Blake O’Brien
Chad Layland
Don Stockton
Martie Mendenhall
Cheryl Peterson
Matthew Keller
Jon Thyberg
Cindy Morgan
Mel Shivvers

MEMBERS ABSENT: None

STAFF PRESENT: Brian Bishop, Deputy Building Official
Cody Christensen, Permit and Development Administrator
Jessica Spoden, Assistant City Attorney
Patrick Phelan, Fire Protection Engineer
Josh Sullivan, Mechanical Inspector

GUESTS: Ed Behrman, Lenox Properties

Meeting was called to order at 3:30 p.m. Meeting was held at the Des Moines Municipal Service Center located at 1551 East Martin Luther King Jr. Parkway.

Item 1: Introductions
Board members, staff, and the public introduced themselves.

Item 2: Old Business

a. Minutes October 11, 2018 Building and Fire Code Board of Appeals
Randy Tinker made a motion to approve the October 11, 2018 minutes. Chad Layland seconded motion. Motion passed unanimously.

Item 3: Staff Report.
Deputy Building Official (DBO) Bishop provided a brief staff report to discuss items of interest from the Permit and Development Center (PDC).
DBO Bishop provided a brief report on the permit numbers for the 2018 calendar year. Generally the numbers of permits was slightly up from 2017. 3270 permits in 2018 versus 3192 permits in 2017. The value of permits was slightly up $506 million vs. $494 million. The number of residential units was down from 1621 in 2017 to 694 in 2018.

Item 4: New Business

a) Election of Officers

Chairperson Gassman asked for nominations for officers. Chairperson Gassman expressed his interest as vacating the chairperson role has he looks to serve his last term on the Board this year. Bart Caldwell volunteered to serve as Chairperson. Dave Kriens volunteered to continue to serve as Vice Chairperson. Don Stockton made a motion to nominate Bart Caldwell as Chair and Dave Kriens as Vice Chair. Randy Tinker seconded the motion. The motion passed with a unanimous vote.

b) Building Code Appeal – Lenox Properties – Furnace in multiple residential unit serving multiple tenants

Board member Gassman opened the appeal by setting the rules of the appeal. The appellant will be allowed to speak their appeal to the Board. Chairperson Gassman recused himself from the proceedings citing a conflict of interest due to Lenox Properties being a customer of Bell Brothers Heating and Cooling. Chairperson Gassman reminded that the Board cannot waive code, but only accept alternative designs that meet or exceed the code requirements.

Edward Behrman with Lenox Properties asked if there would be a time to ask questions to City staff. Jessica Spoden answered that there would be time to ask City staff questions.

Edward Behrman with Lenox Properties presented the appeal regarding the property at 2931 Cottage Grove. Ed owns several apartment buildings in the Drake neighborhood along Grand and Ingersoll Avenue. Mr. Behrman feels that International Mechanical Code has been misinterpreted by City staff and he will point out the specific sections to the Board during his presentation. Ed feels that the code requirements being cited by City staff have been taken out of context of the International Mechanical Code. In addition, Ed has indicated that no review of the International Existing Building Code has been allowed to be considered by City staff.

Ed explained the property to the Board. The property is a large house that was converted into a seven (7) unit apartment building. It has been a seven unit apartment building for the last 60 years. The units utilized one forced air furnace to serve all the units. In November 2017, the furnace was malfunctioning and a new furnace was installed. During the rental inspection in the fall of 2018, it was discovered that a new furnace was installed without a permit. When a mechanical permit was to be pulled for the new furnace, it was at that point when the mechanical inspector was asking to separate the furnace from the other units.

Mr. Behrman cited the International Existing Building Code as taking precedence over the International Mechanical Code. Ed defined this work as a repair, but stated that it could also be viewed as a Level 1 alteration as defined by the International Existing Building Code. Whether it is a repair or a Level 1 alteration, neither would require an upgrade in compliance as long it doesn’t make the building less safe. Ed claims that the replacement of this furnace does not make the building less safe.
Mr. Behrman explained the sections of the International Mechanical Code (IMC) that were cited by City staff. Section 102.4 of the 2015 International Mechanical Code states that “Additions, alterations, and renovations or repairs to a mechanical system shall conform to that required for a new mechanical system without requiring the existing mechanical system to comply with all of the requirements of this code.”

Mr. Behrman referred to IMC Section 108.7 cited by the code official states, "Whenever the code official determines that any mechanical system, or portion thereof, regulated by this code has become hazardous to life, health, property, or has become unsanitary, the code official shall order in writing that such system either be removed or restored to safe condition." The key wording here is "has become," which indicates a change in condition from the previous existing condition, that is, a deterioration of the system. However, the code official has not indicated that the system has deteriorated and thus "has become" hazardous. There is no provision in Section 108.7 that a system operating in the same condition as before shall be condemned under this code.

Notwithstanding the requirements of the International Mechanical Code, and any sections thereof cited by the code official to justify a code violation, the International Existing Building Code takes precedence. The International Existing Building Code is expressly clear that replacement of equipment that serves the same purpose (e.g., furnace) does not require an upgrade in code compliance, so long as the replacement equipment does not make the system less safe than before the replacement. The International Existing Building Code states unambiguously that replacement of a building part, or component of a system, is not the same as reconfiguration or extension of the system. Part of a system can be replaced without requiring the entire system be brought to current code. The code official has cited a code violation by reference to the International Mechanical Code. However, the subject property meets all the requirements of the International Existing Building Code, which takes precedence. We therefore ask the Appeal Board to find that the heating system at the subject property is in compliance with the building code as adopted by the City of Des Moines.

Mr. Behrman feels that the code official is asking for absolute authority for something that doesn’t need to be condemned. Ed explained that he is a responsible landlord with multiple properties.

Dave Kriens asked Ed Behrman if the mechanical inspector provided any alternatives to this problem. Ed responded that he spoke with DBO Brian Bishop regarding possible alternatives, but first the decision of not allowing the furnace serving multiple units needs to be appealed.

Blake O’Brien asked why there was a delay in the permitting process. Ed Behrman responded that the new furnace was installed in November of 2014. Since Ed lives in California, he depended on the installing contractor to perform this work and this did not get done until it was noticed during the rental renewal inspection in 2018.

Dave Kriens asked how long Ed had been a landlord in Des Moines. Ed responded that he bought his first building in 2013. This is the only building he owns that has a forced air furnace.

Don Stockton asked how is the system controlled. Ed responded that there is one thermostat that serves the entire building.

Chad Layland asked if the heating equipment was original building. Ed responded it was the same equipment.

Bart Caldwell asked was there any indication that the system didn’t meet the code required at the time of original installation. Ed responded that it is his understanding that the only new
components must meet the requirements for new installation or it should meet the requirements of the existing building code.

City Staff Summary

Deputy Building Official provided the staff summary. DBO Bishop explained how the community development department functions. New construction, alterations, and repairs permitting and inspections are performed by the Permit and Development Center. The Neighborhood Inspection Division handles the inspection of rental housing units across the city and inspects rental units on a three year cycle.

In November 2018, the furnace was replaced by a local contractor and a mechanical permit was pulled. The unit was inspected by a Des Moines Mechanical Inspector and found to be serving all seven units. Air from all seven units is shared throughout the building. The mechanical inspection did not pass inspection due to an unsafe condition since all seven units share the same air. No mechanical permits were pulled at this address from 2001 until the furnace replacement in November 2018, so no mechanical inspectors had been at this property in some time. The property located at 2931 Cottage Grove is a converted seven (7) unit apartment building that was once a single family home. The conversion took place many years ago. City records for this property indicate that this property had seven dwelling units dating back to 1955. The furnace located in 2931 Cottage Grove serves all seven units.

The City of Des Moines adopts the 2015 International Mechanical Code (IMC) as well as the 2015 International Existing Building Code. Section 108 of the International Mechanical Code addresses unsafe mechanical systems. Unsafe mechanical systems are those that constitute a health hazard are deemed unsafe. The mechanical system at the property in question constitutes a health hazard since it shares the air between residential units. The sharing of air between residential units has been considered a prohibited practice for many code cycles. The sharing of air between units constitutes a fire and health hazard as it could spread smoke, contaminants, pathogens and pollutants.

2015 International Mechanical Code

108.7 Unsafe mechanical systems. A mechanical system that is unsafe, constitutes a fire or health hazard, or is otherwise dangerous to human life, as regulated by this code, is hereby declared as an unsafe mechanical system. Use of a mechanical system regulated by this code constituting a hazard to health, safety or welfare by reason of inadequate maintenance, dilapidation, fire hazard, disaster, damage or abandonment is hereby declared an unsafe use. Such unsafe equipment and appliances are hereby declared to be a public nuisance and shall be abated by repair, rehabilitation, demolition or removal.

The Mechanical Inspection Division is housed in the Permit & Development Center. In 1972, the City of Des Moines adopted its first mechanical code, the 1970 Uniform Mechanical Code.

In the 1970 Uniform Mechanical Code section 706, prohibited comfort heating systems from being arranged that the return air from one dwelling unit is discharged into another dwelling unit.

The appellant has asked to use the provisions of the 2015 International Existing Building Code. The International Existing Building Code (IEBC) is a model code in the International Code family of codes intended to provide alternative approaches to repair, alteration and additions to
The International Existing Building Code section 302.3 and 302.4 allows the use of existing materials and new materials provided that no unsafe conditions exist.

2015 International Existing Building Code

302.3 Existing materials. Materials already in use in a building in compliance with requirements or approvals in effect at the time of their erection or installation shall be permitted to remain in use unless determined by the building official to be unsafe.

302.4 New and replacement materials. Except as otherwise required or permitted by this code, materials permitted by the applicable code for new construction shall be used. Like materials shall be permitted for repairs and alterations, provided no unsafe condition is created. Hazardous materials shall not be used where the code for new construction would not permit their use in buildings of similar occupancy, purpose and location.

The appellant has asked to use the 2015 IEBC for compliance since this is an existing building. The IEBC was developed for older buildings that would have trouble complying with new requirements contained with the building code, with one caveat. In section 101.4.2 of the IEBC, The legal occupancy of any building existing on the date of adoption of this code shall be permitted to continue without change, except as is specifically covered in this code, the International Fire Code, or the International Property Maintenance Code, or as is deemed necessary by the code official for the general safety and welfare of the occupants and the public.

The IEBC was created because existing buildings have a hard time meeting all the requirements for new buildings, but unsafe conditions must be corrected.

Whether the IMC or the IEBC is utilized, the argument is whether a health hazard is created by allowing dwelling units to share air. It is the City’s opinion that both a fire and health hazard exists with the dwelling units sharing air.

DO Bishop stated that key here is whether the Board feels that an unsafe condition exists at this location. Josh Sullivan, Mechanical Inspector, provided additional commentary that this has been a common condition in older converted apartments. Josh stated that he provided many options to the landlord’s representatives for alternate systems. In fact, two doors down had the same condition.

Cody Christensen, Permit and Development Center Administrator discussed that the fire safety aspect of this installation is just as impactful as the health concerns.

Mel Shivvers asked a question about how this situation is dealt with when permits are pulled. Cody responded that staff is unaware until a site inspection is conducted.

Randy Tinker asked about that if a house was converted to apartments today would the heating systems be looked at prior to permits being issued. DBO Bishop responded that the heating system would be a check to ensure proper.

Martie Mendenhall asked if the City felt that the new furnace was safer than the old one. DBO Bishop responded that obviously a new furnace has greater safeguards, but the real question is whether or not the current system is unsafe.

Martie Mendenhall stated that there should be something in the mechanical code so that it doesn’t rely on one person’s decision. Assistant City Attorney Jessica Spoden reminded that the Building and Fire Code Board of Appeals is set-up to allow for building official and fire marshal decisions to be reviewed since the code does allow for the building official or fire marshal to deem buildings or systems unsafe.
Chad Layland asked does the rental certificate go with the owner or the property. Jessica Spoden responded that the rental certificate remains with the property.

Candy Morgan asked how have similar properties dealt with this issue when it is discovered. Josh Sullivan responded that the mechanical inspectors have worked with the property owners to find an acceptable solution that meets the requirements of the IMC.

Chairperson Gassman closed the staff portion and allowed for rebuttal by the appellant.

Ed Behrman asked Cody Christensen what section of code can be used for a trigger. Cody responded that section 108 of the IMC would be used if an unsafe condition existed or was created.

Ed asked Josh Sullivan if filtration or other air cleaning methods could improve indoor air quality. Assistant Attorney Jessica Spoden interjected that if additional items are to be provided as evidence

Ed asked Josh how a decision was made for indoor air quality and how it is measured. Josh responded that he based his decision off of the IMC.

Ed ended his rebuttal stating that the furnace is not unsafe, but that the International Existing Building Code (IEBC) should be allowed to be used.

Chairperson Gassman closed the rebuttal and went to the Board discussion and resolution. Blake O’Brien commented that the building official has the power to deem materials unsafe per the IEBC. Dave Kriens commented that just because something was installed 40 years ago doesn’t mean that it is safe today just because it has been that way. Dave agrees with the City that this is an unsafe condition and should be fixed since it was discovered. Dave feels that the appeal should be denied.

**Board Decision**

Randy Tinker made a motion to deny the appeal. Second by Dave Kriens.

A roll call vote was held:

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Motion passes 8-4, with one abstention.
Item 5: Adjourn

A motion to adjourn was made by Mel Shivvers and seconded by Randy Tinker. The motion passed with unanimous approval and the meeting adjourned at 5:12 p.m.

Minutes prepared and submitted by: Brian Bishop, Deputy Building Official