Drained: Intricacies of septic condemnation confuse, frustrate residents

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Seventeen days before Christmas 2008, at the order of the Brown County Health Department, Brown County Water Utility shut off service to the Hayworth household.

On Aug. 13, 2008, Lowell Hayworth and his wife, Amanda, had bought a new mobile home to replace an existing dwelling at 7143 Oak Ridge Road.

On Aug. 15, environmental health specialist John Kennard appeared on their property with a stop-work order alleging that removing and replacing the mobile home was illegal without an additional septic permit from the health department.

And so started a six-year legal battle, which continues to this day.

West of the Hayworth property, on a plot northeast of Lake Lemon in the mostly abandoned, flood-damaged hamlet of Trevlac, sits the meeting hall for a now-defunct American Legion post.

The owner, Daniel Smith, faces jail time after being convicted of two counts of failure to vacate a condemned property – a Class B misdemeanor with a maximum penalty of 180 days in jail.

County health officials alleged he was living there after the property had been condemned. Investigative notes say sewage was leaking into the basement of a nearby property.

Smith's Aug. 13 trial was the culmination of a decade of legal battles sparked by a condemnation letter Kennard signed.

Documents released by the Brown County Health Department as part of a September 2012 public records request show 20 other properties in Brown County have been condemned in the past five years, although it's unclear how many of those were for failed septic systems.

Kennard claims to have had as many as 160 open septic investigations at one time. He said he currently is reviewing about 100.

How does it happen?

The process by which properties get condemned for septic failure has been questioned and debated in recent years by several property owners, attorneys and health department representatives like Kennard.

Even area counties don't agree on a specific procedure.

The circumstances under which a health department employee can enter a property is one point of debate.

Link Fulp, Bartholomew County assistant director of environmental health, said his office will enter property uninvited only in order to get permission from the owner to conduct an inspection.

Monroe County Health Department septic inspector Randy Raines said he will enter property to conduct an inspection without getting a warrant or permission only if no other option exists.

At least two sections of state law – regular and administrative code – discuss the investigatory powers of health officers.

In short, a health officer or a designee can enter a property at any reasonable time to determine compliance with health laws – with the permission of the owner.

But if the officer or designee does not need permission if he or she has a court order; if an emergency condition exists that could result in a greater public health threat or individual health risk; if the place is public or in plain view; or if the owner has requested a license of some sort through the health department.

Brown County Clerk Beth Mulry could not produce any warrant requests from the Brown County Health Department regarding the Smith or Hayworth cases. In her eight years in office, she said the health department has never requested a warrant.

‘We’re selective’

The attorney for the Hayworth family holds a file of photographs of Kennard entering their property on numerous occasions, as evidenced by changes in weather and time stamps. “No trespassing” signs are posted along the roadside edge of the property.

“We never gave him permission to enter our property,” Amanda Hayworth said. “We never saw a court order.”

Kennard was granted permission to enter once, she clarified, under the supervision of her lawyer. That visit was to observe a septic system inspection conducted by Ed Brown.

“At one point, he would stop here every three or four days,” Amanda Hayworth said about Kennard. “We found out from neighbors that he was walking around while we weren’t here.”

A single search warrant was mentioned by police officers during Smith’s trial. However, it was not introduced as evidence by the prosecutor or the defense. It was requested by

the prosecutor in association with an arrest warrant for failure to vacate a condemned dwelling.

Officers attempted to serve it July 18, 2013, eight years after the initial complaint was levied against Smith.

The name of the person who filed the initial complaint was not included in the investigative notes.

Other curiosities exist in those notes related to the Smith case. In an entry dated Oct. 31, 2011, either Kennard or the health department's other investigator, April Reeves, claimed that during a drive-by inspection, insulation and drywall installation in progress was observed inside the former Legion building.

The property is gated, and the building is set back at least 15 feet from the road, according to photos entered into evidence. Nashville Police Officer Paul Henderson testified to needing a bolt cutter to open the gate to the property.

On four occasions in the investigative log in 2012, a health department employee entered the Smith property to the extent of recording readings on the electric meter and entering the building while Smith was not present.

None of these entries notes that permission was obtained, a warrant or court order was issued, an imminent health hazard was recorded or a permit was requested.

Procedures, however, have recently changed, Kennard said.

He said he now obtains search warrants through the county prosecutor whenever he sets out to conduct an investigation.

"The average citizen thinks I've got nothing to do on a Thursday afternoon, so I'm gonna go pillage and plunder," Kennard said.

"If I knock on the door and the property owner says I can't enter, I get a search warrant. We're selective when we decide to proceed. I can't just arbitrarily pick someone."

Prosecutor Jim Oliver said per Indiana code and local policy, a search warrant is required only when investigating criminal charges, such as failure to vacate. If the health department is investigating civil matters like compliance or public safety, then no warrant is required.

Who can sign?

Questions about procedure extend beyond when or how to enter a property.

On May 5, 2006, Kennard sent the order to Smith to vacate his property.

It was not signed by any officer of any court nor by then-County Attorney Kurt Young, then-Brown County Health Officer Paul Page or any member of the Brown County Board of Health.

“All they (Brown County Health Department) had to do was issue an order?” public defender Andy Szakaly asked. “That’s part of my problem. How can I defend this case without approaching the validity of the order itself?”

During the Smith trial, Szakaly said, the court would not allow him to present evidence attacking the way the condemnation order was issued. Judge Judith Stewart ruled that Smith missed his opportunity by failing to file suit against the health department within the time limit specified in the order.

Szakaly said the condemnation letter did not specify the procedure for challenging the order.

“It’s like Miranda rights,” he said. “How can Daniel Smith be expected to know his rights if he was never informed what those rights are?”

Szakaly plans to appeal the convictions against Smith on those grounds.

Raines said all condemnations in Monroe County require a court order and a hearing at which the owner is given a chance to object.

Fulp said his office almost never condemns property because of septic failure, as condemnations fail to address the health hazard and may make the situation worse when the property is later neglected.

More signature issues

Signatures are a point of contention in the Hayworth case, too.

Kennard’s signature is the only one on several enforcement actions against the Hayworths, including an Oct. 28, 2008, water disconnection order and an Aug. 29, 2011, condemnation order.

While Monroe and Bartholomew county officials disagree on whether a court order is required to condemn a property, both agree authority is not granted directly to the environmental health specialist.

Fulp said all condemnation orders issued in Bartholomew County are conducted under the authority of the local health officer, under advisement of the county attorney.

A county ordinance from 1995 granted condemnation power to agents of the health officer, Kennard said.

Kennard said the decision to attach his name, rather than then-health officer Page's, to condemnation orders came out of meetings among himself, Page, prosecutor Oliver and former county attorney Young.

For at least part of the period covering the Smith and Hayworth cases, Page was suffering from late-stage terminal cancer.

Kennard said the local policy has recently changed on the sign-off procedure, too.

The prosecutor's office has never pursued condemnation charges against anyone owning property that was condemned solely on Kennard's authority. For example, Smith was charged based on incidents related to condemnation orders that Page signed.

Records and memories

Health department recordkeeping questions have surfaced as well.

Kennard claimed to have identified surface evidence of a septic failure sometime between Aug. 13, 2008, and Sept. 8, 2008. He identifies the location as the southeast corner of the property. He said he discovered it "probably" by seeing and smelling sewage, although he could not recall exactly when or where.

Four septic inspectors, two of whom are licensed with the health department, have since provided inspection reports that found no septic system in that area. The reports say the septic system is 20 to 30 yards away, largely on the opposite side of the house.

Pictures show Kennard was present at one of these inspections, and court documents show that results of the other inspections were forwarded to his office.

Yet, Kennard testified under oath as recently as 2013 to having evidence of surface leakage in the southeast corner of the property. When asked to provide evidence of this failure, he was able to recall that a soil sample had been taken, but he was unable to produce the results or remember what they were.

Last week, he continued to maintain that the Hayworths were once operating an illegal septic system. He contends that portions of a separate failing system were covered over in order to mask noncompliance.

However, in Kennard's opinion, this is irrelevant, because he believes, failing or otherwise, the existing 1,000-gallon septic tank is too small for the home.

Septic inspectors Marvin "Junior" Cody and Ed Brown, in separate phone interviews, confirmed that the tank was 1,000 gallons, but both said that was more than sufficient for a house that size. Neither could recall any evidence of septic failure at the property.

In limbo

Along State Road 135 South, another property sits vacant. This one is not yet condemned, although no one is allowed to live there.

“I used to defend John (Kennard),” property owner Susan Showalter said. “We worked together teaching environmentally friendly septic practices. I’m the last person to pollute.”

She said Kennard appeared on her rental property after receiving a complaint from a tenant about a failing septic system. According to Showalter, he found standing water in a hole downhill from the dwelling. Based on this, Kennard declared the septic system to be failing.

Kennard disagrees. He said it wasn’t just water.

“There is a 4-foot (expletive) hole in her back yard,” Kennard said. “We can drive out there and look at it.”

That disagreement kicked off correspondence between health department employees and Showalter that demonstrates how confusing interactions with the agency can be.

In an email dated Nov. 22, 2011, environmental health specialist Reeves told Showalter that she could use an alternative septic method called “pump and haul.” An alarm notifies property owners when the septic tank is full, so a contractor can pump the tank.

As evidenced by receipts from Reed Excavating, Showalter immediately implemented this method.

On Feb. 8, 2012, Kennard testified against Showalter in a small-claims hearing related to a rental disagreement. He claimed that Showalter’s septic system was failing and that she had ignored all orders to rectify the situation.

“She had not paid her bill, so the alarm had been removed,” Kennard said.

Showalter said payment was delayed when the bill was misplaced in a file related to the case. Receipts show that the issue was resolved within a few days of the hearing.

A month later, an email from Reeves said Showalter could return to using the pump and haul method, but per an order from Kennard, she had to totally replace her septic system immediately.

Showalter responded with a request for a specific timeline. About a month later, she sent another message demanding a response. An email from Reeves then stated that Kennard will no longer allow the pump-and-haul method.

The property has been vacant since 2010.

According to the final email in the series, as long as it is not occupied and Showalter does nothing, it will not be officially condemned.

She said the health department has refused to approve proposed changes to the property.

The Hayworths remain in a similarly confusing situation. The family sued the health department, demanding a reversal of the condemnation order.

On June 24, 2013, Judge Joseph Meek ruled that the family had no standing to bring suit because the county had not actually taken the land nor deprived the family of its value.

However, the health department has since contacted the family about leaving the house. The Hayworths have once again filed suit.

Since Aug. 15, 2011, the family has spent more than $20,000 in legal fees and inspection costs.

All they really want to do is live in their home, Amanda Hayworth said.

“We’ll spend every dollar that we have fighting this,” Lowell Hayworth said.