

LAND RIGHTS AND SHELTER THE DUE DILIGENCE STANDARD

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This checklist aims to assist shelter actors to ensure that they respect existing rights over plots of land on which they intend to construct shelter and minimise the risk that may contribute to land disputes. It is also intended to help assisting managers and implementers of shelter programmes in field locations to identify land rights in contexts where information is difficult to obtain.

Warning: Be aware that in some contexts making land and property an issue can lead to evictions or increase land tenure insecurity for vulnerable people. Sometimes, after analysing the issues, it is better to do nothing.



Shelter Cluster
ShelterCluster.Org
Coordinating Humanitarian Shelter

Tenure types

Tenure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property. Such tenure types are applicable in statutory, customary or religious systems.

Adapted from: Committee on Economic, Social and Cultural Rights, General Comment Number 4 on the right to adequate housing (1991)

Variable contexts

Contexts relating to land rights, and the manner in which land and property relations are managed, can vary considerably, for instance in one of the following situations:

- the regulatory environment has transparent and clear rules for land tenure with well-functioning land management institutions,
- identifying who is able to provide authoritative and reliable data on land rights and land tenure arrangements is a considerable challenge, or
- no rule of law environment appears to exist.

Many post-crisis situations tend to be closer in nature to the latter.

Against this background, it is not possible to establish a universal list of documents or authorizations on land rights required before a shelter project can start. Nor is it possible to abstractly define a precise level of legal certainty required before shelter construction.

Due Diligence

This document is based upon the concept of “due diligence” and is a standard for shelter actors to comply with. The goal is to allow shelter actors to:

- Achieve as much legal certainty about land rights as is reasonable, given the context and constraints on resources and time; and
- Reduce, as much as possible, the risk that the construction of shelter causes or contributes to increasing tensions and conflicts around land.
- Avoid future eviction of the beneficiaries.

The due diligence standard requires shelter actors to establish an ongoing process that both anticipates and responds to issues relating to land rights, as they emerge or where there is a risk that they may emerge during shelter construction. This requires:

- Awareness amongst key staff members of the connections between land rights and shelter.
- The mainstreaming of basic land rights verification and monitoring in all shelter activities (either directly or through out-sourcing).
- The creation of information sharing protocols regarding land rights’ issues with other shelter actors active in the same context.
- The establishment of internal rules and procedures that encourage and allow for the application of the due diligence standard.
- Vulnerable groups, especially women and indigenous populations, should be taken into consideration throughout.

Due diligence:

A process of research and analysis in any given situation to avoid harm to other persons or property

I. Planning – understand the context

Do I know how land and property relations are organized?

Objective: To obtain general information about the land rights to:

- Verify who has what right(s) over land for shelter .
- Gain an overview of how land and property relations are managed (i.e. gain an overview of the land tenure system that is in place).
- Identify the land rights' situation of the land as well as the legal or de facto situation (especially with regard to women) of households in respect of the land.
- Decide whether there is sufficient legal certainty to construct shelter.
- Establish what the laws of inheritance are in relation to HLP and the impact that may have on female/child headed households.

Caution: The management of land relations is frequently quite distinct from the situation described in formal state laws and regulations. This is especially the case in post-crisis contexts with weak state institutions and low levels of trust and access to those institutions for the general population. Additionally, in some contexts, the state may itself be seen or act as an usurper of land rights of individuals and communities, which can pose particular challenges when governments allocate land to shelter actors. Finally, within one country, the situation can differ from region to region, and it is not uncommon for rural contexts to be quite distinct from urban contexts when it comes to the management of land and property relations. Moreover, decentralization can mean that local governments have a stronger role in land and property relations management than the central government.

Where to get the information? Local staff are usually the most accessible source of information. They will almost invariably know how land and property relations are managed in practice. Other sources include local government actors, community leaders, lawyers, and of course the affected people themselves.

Outcome: Answers to the questions above will provide a level of certainty as to how easy it will be to find out who has what rights to what pieces of land. Combining this with information about the frequency of land disputes, should give shelter actors a good idea of both the degree of legal certainty about land rights they can obtain and the risk of land rights violations and/or land disputes which may be caused by shelter projects. More caution will be required with shelter projects when there is more uncertainty about land rights and a higher risk of land rights' violations and/or dispute. In such situations broader consultations will be required to ascertain status of land and beneficiaries with a larger group of actors.

Checklist: Planning

Understand the context

- ☑ Are formal state laws the only rules governing land rights or are there other frameworks that determine in practice who has what rights to what land (e.g. customary, religious or traditional law systems)?
- ☑ Is a lack of clarity regarding land rights a common phenomenon or does it appear to be a rare occurrence and do there appear to be many conflicts or disputes around land rights?
- ☑ Is there a system of formal land titles in place (cadastre) and is it (perceived as) reliable and widely used? Is there a clear set of documents that provide conclusive evidence of land rights or are land relations managed without documents?
- ☑ What type of rights can individuals / families / communities have over land (e.g. ownership rights, usage rights, rental rights, collective rights) and do rights over land tend to be separate from rights over buildings on it, or not?
- ☑ How do people, in practice, resolve their land disputes, and what institutions (state or otherwise) do they rely on to address their land grievances and disputes?
- ☑ Which construction byelaws and what permits are required to carry out the project?

II. Planning – Ensure sufficient certainty

Do I have sufficient legal certainty about the land rights regarding the shelter plot and the shelter beneficiaries?

Objective: To reduce the risk of land rights' violations and land disputes as much as possible by obtaining a sufficient level of legal certainty about:

- the land rights of the plot
- the status of the beneficiaries relating to the plot and the shelter to be built.

Caution: Document which steps were taken to obtain legal certainty regarding the land rights over the shelter plot and the legal status of the beneficiaries. This is especially necessary in contexts where land and property relations are managed without much or any formal documentation; where there are significant levels of uncertainty about land rights and legal status exists; and/or where disputes over land are common. In short, the riskier the context from a land rights' perspective, the greater the need to properly document steps taken. This includes keeping copies of agreements and permissions, in itself handy in case of later disputes or changes of mind regarding the beneficiaries' right to use the land or shelter, for example.

Outcome: Based upon the above exercise, shelter actors should be in a position to have the level of legal certainty that is attainable in the context and, where appropriate, have grounds to decide not to pursue the shelter project or, alternatively, put specific measures in place during and/or after shelter is being constructed to manage problems that may arise (see next headings). Taking this approach may also have a preventive effect as regards disputes over land arising from shelter projects.

Checklist: Planning

Ensure sufficient certainty

- What are the land rights over shelter plot:
 - Do the entity/ies, institution(s) or individual(s) giving permission or requesting that the shelter is built on the given plot have the authority and legitimacy to do so? If not, do I know who else I need to talk to?
 - Have I seen the commonly used documentary evidence that proves ownership and/or right to use the land?
 - If documentary evidence is not available or reliable have I spoken to enough stakeholders to ascertain that the plot is not claimed by others than those requesting or deciding to build the shelter?
 - Is there certainty about the boundaries of the plot in question? If not, is there a process I can follow involving the neighbours or surrounding communities to agree the borders and ensure that shelter is not constructed on plots that may belong to others?
 - What arrangements for security of tenure (formal or informal) will the households be able to access (but may not have before the start of the project)?
- What is the legal status of the beneficiaries regarding the shelter and the shelter plot?
 - Is it clear what legal status beneficiaries have in respect of both the land and the shelter to be constructed (depending on the context they could be owners, renters, long- or short-term users)?
 - If they are not owners of the land and/or the shelter, do they have the permission of the owner (a private or public person or entity) or the relevant authority (e.g. community elders) to live on the land / in the shelters for a sufficiently long period of time?
 - Is there a process which can reasonably reduce the uncertainty surrounding the status or permissions for project beneficiaries (e.g. an agreement involving affected stakeholders regarding the right to use or stay on the land or in the shelter)?

III. Implementing

The riskier the context is from a land rights' perspective, the more important and relevant it tends to be for shelter actors to have measures in place to deal with land rights' problems as they arise during construction. This does not necessarily mean that the shelter actors themselves need to address those problems, it may be more appropriate and, from a resource perspective, more efficient to have specialised actors address land rights' issues, such as, sudden disputes over the shelter plot or the right of the beneficiaries to use the land or the shelter. Shelter actors should have the appropriate procedures and structures in place to either refer land issues to the appropriate actor(s) or address the emerging issues themselves.

Objective: To ensure that shelter actors are prepared to react to land issues that emerge during the construction of the shelter appropriately and efficiently, thereby reducing or mitigating the risk of escalation and undue delays or stoppages for the shelter project.

Caution: When land issues arise during shelter construction, they should be brought to the attention of the shelter cluster or relevant coordination mechanism. It is likely that other shelter actors have faced similar issues, and may have found appropriate solutions. Often, recurring land issues may require the humanitarian community as a whole to take advocacy action and/or develop joint approaches. For the coordination mechanism to be able to fulfil this role, each shelter actor must document the issues it encounters and the steps it takes, including the numbers of times each issue arises.

Outcome: Following the above approach will prepare shelter actors better to deal with land issues that emerge during the construction of shelters and, especially when joint action is taken, contribute to the reduction of shelter projects that need to be interrupted or abandoned due to land rights' issues.

Checklist: Implementing

- Do I have a focal person within my team to deal with land issues as they arise during the shelter construction?
- Is there a process in place to decide which land issues to address directly, and which ones to refer to other actors?
- Are there clear guidelines and/ or decision making processes in place to decide when to interrupt and/or cease shelter construction due to land issues?
- Does/do the relevant staff member(s) know who to refer what land issues to?
- Are laws and legislation changing as a result of the emergency?
- Are there clear internal policies in place regarding data protection and follow-up to referrals? (note data protection is important as information about individuals could make them more vulnerable if it got into the wrong hands.)
- Are records kept of land issues that emerge during shelter construction, including steps taken to resolve the issues and the ensuing outcomes?

IV. Evaluating

Once shelter actors stop their engagement regarding a shelter site, land issues may of course still arise and adversely affect the beneficiaries for whom the shelter was constructed. E.g. new actors may come and claim the land or challenge a shelter beneficiary's right to stay in the shelter, while existing actors may come back on their earlier commitments or the agreements put in place before the shelter was constructed.

While shelter actors are often not in a position to undertake medium- or long-term monitoring of the sites they worked on, there are steps they can take prior to ending their engagement which can reduce the risk that beneficiaries suffer subsequently from land rights' related issues. Again the standard is due diligence, i.e. undertake what is reasonably possible to ensure that land issues arising after the engagement ends can be addressed effectively.

Objective: To ensure that actors who work on land rights' issues in the area where the shelter was constructed are fully informed about the shelter project, and know the steps that were taken to obtain and ensure legal certainty regarding the land rights over the shelter plot and the legal status of the beneficiaries as regards the shelter. This will enable them to do their respective jobs and will ensure that beneficiaries are aware of where they can go if they are confronted with land rights' issues regarding their shelter or the plot on which the shelter was built.

Outcome: While the actions described here by themselves will not prevent land issues from arising or fully protect beneficiaries from a violation of their right to shelter, they do contribute to ensuring that, within the given context, the chances of effective protection are as high as realistically possible.

Checklist: Evaluating

- ☑ Do I know which governmental and non-governmental organisations are active (and effective) as regards land rights' issues, including land disputes, in the area and have I informed them of the shelter project and its efforts to ensure legal certainty of beneficiaries?
- ☑ Have I considered whether it is useful and appropriate to share documentation regarding the land rights' arrangements made during the shelter project (including due respect for privacy and data protection rights)?
- ☑ Do I know whether or not beneficiaries are aware where to go if they are confronted with land issues, including challenges to their rights to the shelter or the shelter plot? If they seem to not be aware, can I assist them with obtaining this knowledge, possibly in partnership with the relevant organisations or actors working on land rights in the area? (Responsibility should be shared among actors).
- ☑ Has hand-over documentation been signed? (note this is not required in all contexts and must only be after consideration as to what the is legal position/validity/helpfulness documentation.)
- ☑ Have beneficiary's been informed where their tenure relationship has been changed?

Glossary

These simplified definitions are intended to clarify the text in this document.

Cadastre: a register of property showing the extent, value and ownership of land.

Customary Land Tenure: the communal possession of rights to use and allocate land by a group sharing the same cultural identity or established by customary practice

Due diligence: a process of research and analysis in any given situation to avoid harm to other persons or property

Land Tenure: the set of relationships with respect to housing and land, established through statutory law or customary, informal or religious arrangements

Security of Tenure: the degree of confidence that land users will not be arbitrarily deprived of the rights they enjoy over land or the benefits that flow from it

Statutory Land Tenure: established by law or statutes — they consist of two main types, private and public tenure systems, and can guarantee individual or collective rights

Statutory Law: legal rules issued by a state authority which, depending on the state structure can emanate from the national, regional or local authorities (also sometimes referred to as “formal state law”)

Religious law: legal rules that emanate from a religious authority and/or are part of texts seen as divine

Tenure arrangements: sets of documented and undocumented practices, rules and institutions which determine access to and control over housing, land and natural resources

Further reading

- Housing, Land and Property. Top Ten Resources for Shelter Actors.
- <https://sheltercluster.org/References/Pages/CrossCutting.aspx>.
- Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context, UN Doc. No. A/66/270 (2011)
- <http://www.nrc.no/?did=9642898>
- Payne, G. and Durand-Lasserve, A., Holding on: security of tenure – types, policies, practices and challenges (2012) www.ohchr.org/EN/Issues/Housing/Pages/StudyOnSecurityOfTenure.aspx
- UN-HABITAT, Land and Natural Disasters: Guidance for Practitioners (2010)
- UN-HABITAT and Global Land Tool Network Monitoring Security of Tenure in Cities (2011)

or contact...

HLP@sheltercluster.org

Disclaimer: Whilst every effort has been made to ensure that this document is accurate and representative of the experiences of shelter cluster members, it may be revised at a later date.

This document is based on an initial draft by IOM for the shelter cluster.