

BCTG ● AVOCATS



Office franco-allemand pour
la transition énergétique

Solar plants:
Review of case law on solar plants authorisations in
France

6 November 2018

Agenda

Introduction

1. Legal status of solar plants
2. The “classic” litigation concerning building permits
3. The “specific” litigation resulting from the features of solar plants
4. Focus on the consideration of usage conflicts by the judge

References of case law

INTRODUCTION

Overview

❖ 35 decisions released since mid 2016

- **Conseil d'Etat (CE) (Administrative Supreme Court):** x3
- **Administrative Appeal Courts (CAA):** Marseille x5, Bordeaux x12, Nantes x4, Lyon x1
- **Administrative Tribunals (TA):** Marseille 1, Poitiers x3, Montpellier x1, Toulouse x1, Pau x1, Nancy x1, Toulon x1, Nîmes x1

❖ Contested authorisations

- **Building permit refusal:**
 - Confirmed x3
 - Annuled x2
 - Visit before the trial x1 (TA Toulouse, 15.06.16)
- **Building permit order:**
 - Confirmed x7
 - Annuled x7
- **Expertise** in order to determine if the site coverage enables an agricultural activity and under which circumstances: accepted x1 (CAA Marseille, 25.05.2018)
- **Non-opposition to a prior declaration** x1

INTRODUCTION

❖ Claimants typology

- Petitioners
- Associations
- **Neighbours (very liberal interpretation)**: The neighbour, who owns and farms a plot of land near the site of the project is admissible to challenge a PV building permit (CE, 28.07.17, different position from CAA)

❖ Interventions

- Intervention of M.D is allowed since **he lives near the site coverage** of the solar plant (CAA Bordeaux, 3.04.18)
- Intervention of a **Wine Syndicate** is allowed since **it contributes to the general interest mission** of preservation and enhancement of land, local traditions, know-how and local specialty products (AOC)(CAA Marseille, 6.07.17)

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1. LEGAL STATUS

❖ Necessary facilities for an equipment of collective interest (« Installations nécessaire à un équipement d'intérêt collectif »)

❖ As necessary facilities for an equipment of collective interest , solar plants are allowed in non-urbanised areas of the municipal map (« carte communale ») and in A and N areas of the local urbanism plan (PLU) « when they do not prevent agricultural, pastoral or forestry activities on the area on which they are implemented and when they do not damage the safeguard of naturel sites and landscapes ».

❖ Pursuant to Case Law:

- A solar plant Project must be regarded as a necessary facility for an equipment of collective interest, because it helps satisfying a collective need thanks to the sale of the produced electricity to the public, (CAA Bordeaux, 3.04.18)
- The implantation of the solar plant, on an area identified as an agricultural area, must be conditional on the possibility of maintaining agricultural activities on the land plot (TA Montpellier, 26.09.17)

1. LEGAL STATUS

❖ Development of natural resources and municipality general interest

❖ Pursuant to Article L. 111-1-2 c. urb. and Case Law:

- A solar plant is not considered as a necessary construction or facility to the development of natural resources; although it uses solar radiation to produce electricity, the solar plant shall not be implemented in a zone where construction is not allowed **for the sole reason that it uses natural resource** (TA Montpellier, 26.09.17)
- In order to consider a solar plant as of a general interest, the city council shall provide specific elements (situation of the municipality, advantages of the project...) (CAA Lyon, 13.12.16)

1. QUALIFICATIONS JURIDIQUES

❖ Urbanisation (littoral and mountain Acts)

❖ Applicable principle in those areas:

- General principle in mountain and littoral areas: the urbanisation shall be done **in continuity with the existing urban areas** (« *en continuité avec les agglomérations et villages existants* ») (Articles L. 121-1 et seq. and L. 122-1 et seq. c. urb.)
- CE considers the installation of solar plant as an **urbanisation (opération d'urbanisation)** (CE, 28.07.17)

❖ Application to solar plants

- Littoral area: is not in continuity with existing urban areas, a solar plant located:
 - **a few hundred meters away from the runways of an aerodrome** (CE, 28.07.17) or
 - **near a hamlet** that can not be regarded as a village due to the low number of constructions (CAA Bordeaux, 17.10.2017)
- Mountain area: it is possible to derogate from the urbanisation in continuity with existing urban areas in a mountain area in accordance with the town planning code (c. urb.), as long as the municipal council takes a decision recognising the general interest of the solar plant (CAA Lyon, 13.12.16)

Plan de l'intervention

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2. CLASSIC LITIGATION CONCERNING BUILDING PERMITS

Case law is « classic » with respect to a building permit submitted to an environmental impact assessment (1):

- ❖ Insufficiency of building permit application, public enquiry, specific prescriptions
- ❖ Insufficiency of the environmental impact assessment
 - In the context of an environmental impact assessment, when an **additionnal impact assessment** is recommended by the environmental authority (AE), the petitioner shall submit again this complement to the AE prior to add it to the public enquiry file, if the complements have addressed such deficiencies that the AE would not have been able to submit opinions on the application about environmental impact without them (CE, 28.06.17)
 - **Insufficiency of the site initial state and environment study** when prospecting activities were very limited and achieved in a short period of time and do not allow for an analysis of effects of the Project, both direct and indirect, temporary and permanent, on wildlife (CAA Marseille, 18.03.16)

2. CLASSIC LITIGATION CONCERNING BUILDING PERMITS

Case law is « classic » with respect to a building permit submitted to an environmental impact assessment (2):

❖ Compatibility of solar plants in forest and natural areas

- Does not affect forest and natural areas, the Project located in a forestry area with timber exploitation and which is characterised by **depleted strains and low-quality wood** accompanied with **compensatory measures** (CAA Bordeaux, 3.04.18)
- In view of the **rich variety of plants and wildlife** of the site, the authorised Project is not compatible with the naturalness of the area, despite compensatory measures being offered by the petitioner, and shall not be granted on the basis of the exemption provided for in the PLU not to build in a N area (CAA Nantes, 22.12.17)

❖ Compatibility of solar plants in wetlands

- When the applicant provides for compensatory measure for the nature and surface area of a new wetland to be built, it is not necessary to specify the location of this new area (CAA Bordeaux, 27.04.17)

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3. SPECIFIC FEATURES OF SOLAR PLANTS

Case law is specific to issues related to solar plants in other cases:

❖ Due to particular risks:

- **Pollution due to the composition of the panels:** no fire causing the volatilisation of boron contained in the panels has been observed and would justify the invalidation of a permit to build a solar plant (TA Poitiers, 12.05.16)
- **Fire:** a solar plant project located in a high hazard area for forest fires shall include requirements on the accessibility of emergency services and the need to provide a fire reserve (CAA Bordeaux, 3.04.2018)
- **Tornado:** a tornado in the immediate vicinity of the site appears to be rare. In addition, the photovoltaic panels are fixed, of low height and benefit from anchoring by plugged piles, which further minimises the risk of accidents (CAA Bordeaux, 13.03.18)

❖ Due to Natura 2000 areas:

Because of the large site coverage: the impacts on hunting, breeding and wintering areas (birds) shall be assessed

3. SPECIFIC FEATURES OF SOLAR PLANTS

❖ Due to the impact on the landscape:

- Article R. 111-21 of the Town Planning Code provides that:
“The project may be refused or accepted only subject to compliance with specific requirements if the constructions (...) are likely to affect the nature or interest of the surrounding areas, the sites, the natural or urban landscapes and the conservation of monumental perspectives”

In practice, judges carry out a case-by-case analysis:

- Front view of the project with a hiking trail but **limited perception** due to the reliefs around the project, low height of the fixed table structures and 2.5 km distance (CAA Marseille, 9.05.18: building permit approved)
- **Landscape requirements:** the inverters and the delivery station’s facade covered with plaster or stone facing reminiscent of the local building (CAA Marseille, 9.05.17: building permit approved)
- Project located at an altitude of approximately 800m which will alter the landscape by introducing **constructions unrelated to the existing landscape** and will be visible from the land at a higher altitude (CAA Bordeaux, 29.06.17: building permit cancelled)
- By simply referring, in broad terms, to the high agricultural potential of the sector in which the project is located, the interest of the site and the monumental perspectives of the sector, the prefect did not justify a building permit refusal based on the **visual or aesthetic qualities of the relevant sector** (TA Montpellier, 26.09.17: refusal cancelled)

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4. USAGE CONFLICTS

Most of case law concerns the compatibility of solar plants project with agricultural activities:

❖ Conditions laid down by case-law

- According to the town planning Code, a Project shall not compromise the agricultural activities that has a potential to be farmed on land with **real agronomic potential** (CAA Nantes, 20.03.17)
- It is necessary to take into account both agricultural activities already undertaken and the circumstances that such **activities are intended to be developped** (TA Montpellier, 26.09.17)
- The Town Planning Code does not require to maintain **the same agricultural activity** on the site (CAA Bordeaux, 15.03.18)

❖ Projects approved in agricultural areas

- A project located in an agricultural area but **without an agronomic potential** and without current activity (CAA Marseille, 9.5.18)
- A project located in an area consisting of **old and uprooted vines, abandonned lands and moors** (CAA Marseille, 6.07.16)
- A project composed of high panels that **enable sufficient alpaca breeding** (maintien d'un activité agricole significative) (CAA Bordeaux, 15.03.18)

❖ Projects cancelled in agricultural areas

- A project located in an agricultural area (growing of cereal and corn) **should not modify the local activity** and replace it by a new activity (flowering plants for bees) (CAA Nantes, 29.12.17)

REFERENCES OF CASE LAW

Conseil d'Etat (Administrative Supreme Court)

- CE, 28 juillet 2017, 397783
- CE, 28 juin 2017, 400009
- CE, 8 février 2017, 395464

Administrative Appeal Courts

- CAA Marseille, 25 mai 2018, 18MA01285
- CAA Marseille, 9 mai 2018, 16MA02057
- CAA Bordeaux, 3 avril 2018, n°16BX00674
- CAA Bordeaux, 15 mars 2018, 16BX02223, 16BX02224, 16BX02256
- CAA Nantes, 29 décembre 2017, n°17NT00513
- CAA Nantes, 22 décembre 2017, 16NT01068
- CAA Bordeaux, 17 octobre 2017, 15BX01691
- CAA Bordeaux 17 octobre 2017, 15BX01693
- CAA Marseille, 6 juillet 2017, 15MA03167
- CAA Bordeaux, 29 juin 2017, 15BX02461, 15BX02462, 15BX02463, 15BX02460, 15BX02459
- CAA Marseille, 6 juin 2017, 15MA04909
- CAA Bordeaux, 27 avril 2017, 16BX00707
- CAA Nantes, 20 mars 2017, 15NT02639
- CAA Lyon, 13 décembre 2016, 15LY00920
- CAA Nantes, 17 juin 2016, 15NT00801
- CAA Nantes, 17 juin 2016, 15NT00801

Administrative Tribunals

- TA Montpellier, 26 septembre 2017, 1505355
- TA Montpellier, 26 septembre 2017, 1505355
- TA Montpellier, 26 septembre 2017, 1505355
- TA Poitiers, 12 mai 2016, , 1402329, 1402330, 1402331

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