



LPA-CGR avocats



OFATE

« L'éolien et la valeur immobilière : présentation d'études et contentieux français relatifs au rapport entre parcs éoliens et valeur immobilière »

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Introduction

- ▶ Due to its characteristics, wind energy gives rise to many fantasies. To challenge the implementation of wind power projects, opponents raise procedural or “scientific” arguments but also try to convince with arguments of fear, which are essentially not impartial.
- ▶ Just go to the website of the FED, one of the main anti-wind organizations in France, to see the evolution of the messages conveyed over many years. If the question of landscape impact was one of the first to be highlighted and if it has never ceased, if we have known the NIMBY phenomenon for a long time, it has many ramifications. New arguments have thus emerged in the hope of convincing people of the low acceptability of wind energy projects. Their new motto is " the social acceptability of wind energy " is equal to zero ".
- ▶ As part of these phantasmagorical arguments, some people seek to give themselves a scientific veneer. This is the case for the argument concerning property devaluation. An old argument but which, by its subjective aspect, persists even though the studies carried out make it possible to contest it.
- ▶ Studies have tried to demonstrate the reality of the devaluation of prices with little success. On the case law side, the particularities of such argument gives rise to different positions depending on the jurisdictions.

I. The empirical studies

▶ The English Parliament, in its Report dated 2007-2008 questioned the link between wind farms and property devaluation. The position was quite biased as the report concluded that « *However, to-day giants have a huge impact on value as is evidenced by property experts active in the residential market, (...) It is no wonder that families are adamantly opposed to wind turbines being located close to their homes* ».

▶ In Denmark, a law in 2008 organised the compensation of the prejudice related to the loss of value for neighbors of wind farms, despite the fact that such law could be seen as contrevailing to the promotion of renewables.

After the adoption of such Law, apparently 53 % of the applicants received a compensation of approx. 8 000 € in average.

In 2014, a study attributed a 3% price reduction to visual nuisances and 3 to 7% to noise pollution, which only affects houses in immediate proximity to a turbine.

➤ A study carried out in 2016 analyzed Dutch house price data and estimate a small negative effect of -1.4% for wind turbines within a 2 km distance.

One thing is clear : there is a NIMBY phenomenon. But the reality of the impact was not proven scientifically.

I. The empirical studies

First, it is important to underline that surveys show good acceptability of wind farms, including from residents living near them. For example, we refer to the recent survey carried out in 2018 by Louis Harris Interactive in France to FEE's request. From such survey, we learn that 73% of French people say they have a good image of wind power (and even 23% a very good image), especially the youngest (84% among 18-34 year olds, 78% among 35-49 year olds). This image is even better among wind farm residents (80%). Wind turbine residents are indeed more positive than all French people, who mostly attribute a set of positive qualifiers to wind turbines.

Secondly, studies confirm the lack of impact on a long term basis.

➤ The study by Martin Heinzman and Carrie Tuttle of Clarkson University School accredits the theory of the "anticipatory stigma theory". Entitled "Values in the Wind: A Hedonic Analysis of Wind Power Facilities" and published in July 2011, this study covered 11,369 real estate transactions over a period of 9 years in northern New York State. The following observation was made:

"The authors of the study, when looking at the period from the announcement of the installation of a wind farm, but before it came into operation, recorded a negative impact in the range of 6 to 16% for homes within one mile (1.6 km). (...) Thus, the risks perceived following the announcement of the implementation of a wind power project are the highest when they cannot be precisely quantified; the impact on the value of homes located near the perimeter where the project is to be implemented may be negative during the period following the announcement but before construction has begun.

Once the wind farm is built and operated, statistical data reveal that the selling prices of real estate homes located near the wind farm return to "neutral" levels".

I. The empirical studies

▶ A study carried out by the Royal Federation of Belgian Notaries led to the same conclusions. Entitled "Possible impacts of the installation of wind turbines on the real estate market in Walloon Brabant" and carried out in 2010, the study was based on the results of the National Institute of Statistics, which publishes every six months on its website a study of real estate values, common by municipality, based on the prices resulting from authentic notarial sales deeds.

The study examined press claims about the impact of wind farms on the value of nearby homes. It cited the "Plaine de vie" website, which claims to be the "Comité citoyen pour la sauvegarde de la plaine de Boneffe", stating that "the land and houses located around a wind farm are on average devalued by 10 to 30%" and adding that they have as an example "the evolution of the real estate market in Perwez before and after the wind project", based on the fact that property experts will be able to certify these figures.

▶ However, the figures analysed by the Royal Federation of Belgian Notaries revealed a completely different conclusion.

These results showed that for the municipality of Perwez, ordinary residential buildings "have continued to increase from 2000 to 2008 inclusive, rising at the peak of each quarter, from 98,223 euros in 2000 to 185,505 euros in 2008". The study states that the computerised database of points of comparison, common to notaries in Brussels, Flemish Brabant and Walloon Brabant, leads to the same conclusion: taking into account ordinary residential buildings but also secondary dwellings such as villas, "this database establishes that property values have increased in Perwez from 195,642 euros in 2009 to 201,607 euros on 30 October 2010".

This Belgian notarial study revealed the erroneous presentation of information by opponents.

This study is not the only one to have reached this conclusion.

I. The empirical studies

▶ In France, the association CLIMAT ENERGIE ENVIRONNEMENT signed a study named « Assessment of the impact of wind energy on real estate – Context of the Nord-Pas-De-Calais » between 2007 and 2013. It is interesting as such study examines the situation of a Region where a lot of wind farms were installed and since a long time.

The study analysed 5 areas located at a distance of less than 10 kms of a wind farm : Widehem, Cormont, La Haute Lys, Valhuon and Fruges. It represents 240 towns and a large number of turbines.

In addition, the study covered a period ranging from the announcement of a wind farm project to its actual commissioning, which represents a sufficiently representative observation period.

At the end of the investigations, the conclusion that emerged was that the municipalities located near the wind farms were not affected by an apparent decrease in building permit applications. It even showed that the volume of transactions carried out for building land had increased, without a significant decrease in value of m². On the other hand, the number of authorized dwellings has also increased. Finally, no departures of resident owners have been specifically identified following the installation near wind farms that caused a decline in property values.

▶ Thus, the study by the CLIMAT ENERGIE ENVIRONNEMENT association highlighted the fact that visibility on wind farms did not have an impact on a potential "disaffection of the territory with regard to the acquisition of a property". The study goes even beyond the very proof that there is no impact on property value, it also shows that local authorities have benefited from economic benefits that have made it possible to implement attractive public services for current and future residents.

I. The empirical studies

► In Germany, the city of Aachen published a report entitled "Does the Vetschauer Berg wind farm have an influence on the residential real estate market in Vetschau and Horbach?", on 16 September 2011 in the daily Aachener Zeitung.

The city of Aachen built a large wind farm about 5 km from the city's historic center. The study found that although the construction of the wind farm resulted in longer delays in the sale of the properties, the impact on the price level could not be "determined with absolute certainty".

► The most recent study was published in Germany in 2018 by RUB/RWI Essen. It concludes on an estimation of an "average treatment effect (ATE) of up to -7.1% for houses within a one-kilometer radius of a wind turbine, an effect that fades to zero at a distance of 8 to 9 km. Old houses and those in rural areas are affected the most, while home prices in urban areas are hardly affected. These results highlight that substantial local externalities are associated with wind power plants".

But such study may seem to be a little biased as it also indicate : "In addition to posing hazards for birds and bats, turbines make noise and affect the aesthetic appeal of the landscape. Ultimately, these impacts may bear negatively on house prices".

► At least, what is confirmed by the studies is the NIMBY phenomenon. Psychological, such phenomenon did not received a translation in law. Indeed, case law shows that judges are also not convinced by the existence of a real estate devaluation.

II. Litigations in France

BEFORE THE ADMINISTRATIVE JUDGE

▶ Litigation relating to the devaluation of real estate assets due to their proximity to wind turbines is not one of the main arguments raised against building and operating permits.

Through landscape logic/preservation of the living environment, opponents of wind projects try to argue that the establishment of a wind farm will lead to a devaluation of their property. However, it remains an argument that is rarely used because it is not likely to be successful.

On the one hand, this does not make it possible to demonstrate its interest to act since it is a question of demonstrating an infringement of the conditions of enjoyment of the property and since the judge has so far never acknowledged that this was indeed the case.

On the other hand, the opponents are unable to justify the devaluation. They try to rely on decisions of the judicial judge but the fact remains that these decisions are circumstantial and do not affirm a principle of devaluation.

▶ First, we recall that this specific analysis does not have to be included in the impact study (CAA Marseille, 6 April 2016, n°15MA01023; CAA Douai, 16 April 2015, n°13DA01952).

▶ Secondly, we note that the administrative constantly rejected the argument related to the irregularity of the authorization to build and operate a wind farm considering the impact on the real estate value. As it is not demonstrated in general, it is not an argument which is admissible before the administrative judge.

II. Litigations in France

BEFORE THE CIVIL JUDGE

- ▶ Case law from 2006 to 2016 shows that the civil judge was particularly lenient in favor of applicants who claim damage caused by the devaluation of their real estate located near a wind farm. In these disputes, the plaintiffs relied on two grounds: the default of consent characterized by a fraudulent manoeuvre and the abnormal neighbourhood disturbance.
- ▶ The court assessed the fraudulent reluctance of the seller towards the buyer with regard to wind farm projects, as well as the in concreto assessment of the pre-existing environment to which the buyers attached particular importance and the alleged nuisances in which the devaluation of the real estate is invoked.

In the decision of the Tribunal de grande instance of Angers of 9 April 2009 (n°08/03158), a couple had signed a promise of sale for a residential house, through a real estate agency. However, after the signing, they discovered that a wind farm project was developed and that the building they had just acquired was located within the project area. Six turbines were to be installed at a distance of about 1100 meters from it.

The court stated that "the wind turbines will be visible from the residence", "that noise pollution will exist, the location of the wind turbines being close to the residence and the medical studies conducted on the impact of the operation of the wind turbines on health showing that the noise generated by the wind turbines is the most frequent complaint of residents who complain of haunting noise. This is a concern that causes sleep and attention problems and does not come from the wind but from the rotation of the gears of the machinery and the dynamo that produces electricity, thus thwarting Mr. C's analysis on wind density".

On these findings, the court concluded that "the fear of noise and visual pollution caused by these wind turbines and the uncertainty as to their impact on health can only make it difficult to sell such property"; as a result, "the building will lose 20% of its market value".

This analysis has been repeated other times.

II. Litigations in France

► The Court of Montpellier also adopted this analysis in its decision of 4 February 2010 (n°06/05229). The owners of a vineyard whose legal expert noted "the appearance but also the serenity of an abbey", claimed that the construction of four wind turbines caused a depreciation in the value of their property. The court noted that "the judicial expert observed that "the sudden discovery from within the domain of the presence of the last four wind turbines, testimony to the industrial modernity of the 21st century, may leave one particularly perplexed by the bucolic contrast offered by the property of Bouquignan in its plant setting".

The court then declared that "if the conservation of an intangible countryside landscape does not constitute an acquired right, the construction of 21 wind turbines on a hill, in a peaceful environment of scrubland, is likely to create an abnormal neighbourhood disturbance", that in addition to the "visual shock caused by the sight of wind turbine masts and blades in such an environment, there is a hearing disturbance which has been noted by the legal expert".

Thus, "the establishment of a gigantic wind farm on the immediate boundary of an old and peaceful wine-growing estate clearly constitutes a disturbance that exceeds the admissible constraints of the neighbourhood by the permanent visual impact of a degraded landscape, by equally permanent auditory nuisances that alter daily life and by an obvious depreciation of the value of the estate. This abnormal neighbourhood disturbance is not intended to be reduced or eliminated by the mere award of damages".

The court adds that "the depreciation of the value of the Domaine de Bouquignan, which has been estimated (...) at 20% of the 2003 value of the domain, i.e. 228,673 euros, remains valid due to the maintenance of most of the wind farm". The wind turbine company was ordered to pay compensation for the devaluation of the estate's land value but also damages and to destroy the four disputed wind turbines.

II. Litigations in France

- ▶ The Rennes Court of Appeal, in its judgment of 20 September 2007 (No. 06/02355), also recognised the depreciation of a building up to 28 to 46% of its current value if the wind turbine installation project were to start operating, on the basis of the certificates of the notary and the estate agent. The Court reiterated its position in its judgment of 25 March 2014 (No. 12/01847), recognising a loss of chance of selling the building at the local property market price, for similar products located in rural areas, up to 60%. It was an existing wind farm and the Court reasoned on the hypothetical case where the applicant would like to dispose of its property; it assumes that the potential purchasers concerned would like, in view of the characteristics of the area, a plot of land in a quiet, rural environment and located in an agricultural area. The presence of wind turbines would represent a gap in the expectations of potential interested buyers; however, the Court does not rely on any objective, concrete or conclusive study.
- ▶ This reasoning of the Rennes Court of Appeal, taken up by other courts of appeal (for example, the Douai Court of Appeal's judgment of 16 April 2009, No. 08/09250) is perfectly in line with the conclusion that has been reached by American studies on the effects of the wind farm anticipation stigma theory.
- ▶ The majority of courts rely more on the assessment of hypothetical damage than on the existence of real and certain damage. Jurisdictions therefore usually do not base themselves on any objective and certain study that would prove that wind farms are potentially capable of impacting property prices.

II. Litigations in France

► Nevertheless, a reversal of case law was noted in 2016.

In a judgment of 8 November 2016, the Angers Court of Appeal (No. 15/008004) held that abnormal neighbourhood disturbance when the construction of the wind farm is hypothetical was not constituted; it recalled that to be characterised, the abnormal neighbourhood disturbance must be of a certain nature.

This judgment restores the fact that an abnormal neighbourhood disturbance cannot be recognized as a preventive measure and that as long as the park has not been built and put into operation, the disturbance does not yet exist and cannot therefore be considered abnormal and give rise to compensation.

This reasoning is echoed by the Court of Appeal of Rennes in its judgment of 11 May 2017 (No. 14/01909). Moreover, in a judgment of 25 January 2017 (No. 15-25.526), the Court of Cassation recalled that the theory of abnormal neighbourhood disturbances cannot override the principle of separation of administrative authorities.

► The Court of Cassation points out that the wind farm project was previously the subject of an impact study and a public inquiry before being authorized by the prefect, in accordance with the environmental code. Consequently, the intervention of the judicial authority on this subject can only be contrary to the administrative authorization issued under the ICPE regime.

Moreover, the assessment of the visual and aesthetic disturbance that may result from the installation of a wind farm is subject to a significant amount of subjectivity, excluding even more the examination of the judicial authority, which would then have to substitute its assessment for that of the administrative police authority.

II. Litigations in France

- ▶ While a reluctance was nevertheless observed for the Riom Court of Appeal, which confirmed the decision handed down by the Montluçon High Court finding moral prejudice for the applicants because of the depreciation of their building in the immediate vicinity of a project for eight wind turbines (judgment of 22 January 2018, No. 16/01488).
- ▶ The position tending towards a reversal of the case law was nevertheless confirmed by the judgment of the Court of Appeal of Caen of 3 April 2018 (No. 15/03626), in which the applicants invoked a risk of damage to their house, which they claimed would suffer a depreciation due to the presence of the disputed wind turbines.
- ▶ The Court held that "the spouses D. did not justify by any updated production of the reality of the devaluation of their property due to the location of the disputed wind turbines, the only document paid to the debates consisting of an evaluation of their building established in 2004, not making it possible to assess the reality of the alleged damage, the sole assertion that "the presence of five wind turbines within a radius of 350 to 1200 m necessarily leads to a reduction in the value of the house" was insufficient in this respect".
- ▶ The judicial judge thus appears to base his assessment essentially on the evidence and the certainty of the damage claimed. This is the application of the principle that implies that compensation is only granted if there is proven harm. However, when it comes to real estate devaluation, proof is difficult. It is therefore to be hoped that these disputes will not increase in number.

Thank you for your attention



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