Competence of local government Building Board in elimination of the consequences of arbitrary construction

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Abstract. In accordance with the provisions of regulatory enactments of the Republic of Latvia, the law obliges the local governments to establish a Building Board within their administrative territory or, in co-operation with other local governments to develop joint Building Boards and ensure the resources required for the operation of a Building Board, thus providing for the legality of construction process in their administrative territory. Building Board is an institution of special status, established at the local government and it is one of the municipal structures that has been delegated to control the legality of the building process in the administrative territory of local government, therefore, the Building Board is an intermediate administration institution that is bound by external regulatory enactments that are binding on derivative public entity, and, therefore the administrative procedure is binding on them as well. The objective of the article is to study the competence of Building Board in the elimination of the consequences of arbitrary building by determining the principal functions of the Building Board, signs of the detection of the arbitrary building and the competence of the personnel of the Building Board and the competences of the Building Board personnel in the review of arbitrary construction cases. The article evaluates the administrative acts of the Building Board that impose the duty of the addressee of the administrative act to eliminate the consequences of arbitrary building.

1. Introduction

Building is the sector of economy that falls within the competence of the Ministry of Economics. To make the planning, control, organisation and monitoring of the construction processes easier and more efficient, the government has delegated these rights to local governments. In each administrative territory a local government has been established, building boards are established under its authority and regulate the building processes in the particular municipality.

Many individuals in contemporary developed world own real estate that they wish to transform and make more attractive by reconstructing the existing buildings or renewing them, as well as constructing new buildings on their land plots. Foreign investors in Latvia invest their financial resources in construction and implementation of different new projects. Real estate companies have been established in the country that are involved in the transactions in this area. Some of them are implementing new projects by constructing residential villages, multiple apartment homes or commercial objects.

The importance of building is determined by significant proportion thereof in the development of gross domestic product. Building is relatively labour-intensive process and, on national scale, it attracts approximately one half of all capital investments. Building is associated with any sector of economy, since it creates basis for that – in the form of buildings and constructions. Therefore, development of viable building and construction industry is important for every country.
Building board is a special status institution that has been developed at each local government and is one of municipal structures that are authorised to control building processes in the administrative territory of the local government.

Building are occupied by people and would seem reasonable to expect that the way they are designed and constructed protects people’s health and well-being, and the effectiveness of this would be verified in practice. However, the construction sector is unusual in that is does not routinely evaluate the performance of its artefacts [12].

Construction project success depends on the multi – firm project organizations involved working together satisfactorily. The success of construction projects is a fundamental issue for most governments, users and communities [11].

To ensure that the process of building is successful, the following factors must be observed: safety and quality; past performance; environment; management and technical aspects; organization; experience; size/type of previous projects; finance [4].

The objective of the article – to determine the competence of building board in the prevention of arbitrary construction. Due to this, the authors study and analyse the following:

1) The legal aspect of the development of building boards;
2) The competence of the building board and implementation thereof;
3) What the meaning of arbitrary building is;
4) The competence of the building board in the elimination of arbitrary consequences.

Building board is an intermediate administration institution bound by external regulatory enactments that are binding upon derivative public entity. The hierarchy that must be observed, while making decisions – the Constitution of the Republic of Latvia, laws, Regulations of the Cabinet of Ministers, Binding municipal regulations.

In accordance with the regulatory enactments, the administrative act issued by the Building Board or actual action can be contested by submitting a complaint to the Building Board. The decision of the City Council regarding the contested administrative act or actual action can be appealed at the Administrative District Court. [6]

2. Materials and methods
The scientific research methods used in the article of the author:

1) descriptive method that will help to determine the institutes of administrative law, for instance, Building Board and its place in the system of administrative institutions;
2) the dogmatic method will help correctly understand administrative norms;
3) the analytical method will help to determine and to assess the content of legal concepts and legal principles.

All of the aforementioned methods enable to obtain research results and to develop theoretical conclusions in the area of elimination of consequences of arbitrary building.

Significant number of the regulatory enactments of the Republic of Latvia is required to reach the set target. Internet resources of specialised government institution websites were used to obtain the aforementioned regulatory enactments, international data bases were used. At the same time, legal practice was examined during the development of the article.

3. Results and discussion
3.1. Building Board as the institution developed by a derivative public entity
Safety of building is the practice of designing, constructing, operating, maintaining and removing buildings in ways that no one has deteriorated health, suffered injuries or died due to the use of the building [7].

State government institution structure of Latvia consists not only of direct administration (state) institutions, but also derivative public entities, including local governments. The existence of local governments arises from the concept that direct administration entities cannot perform all administrative tasks in a centralised an effective manner in the entire territory of the country. There are many
administrative tasks, the effective implementation of which is possible only with the knowledge of the local conditions, including the needs of the residents of respective administrative territory [5].

The local government that is responsible for the operation of the respective building board in its territory is a specific form of state administration, where the residents living at the places of residence of the country are involved in the implementation of the state administrative operations. Three differences between local governments and other derivative public entities have been mentioned in scientific literature: the local government is operating in a particular territory, the local government is operating in the interests of the residents, the municipal government is independent in its actions.

Construction Law defines the concept – building board as a municipal institution or a structural unit, or an institution established by several local governments. The function of building board can be performed by several structural units of the local government, each of these institutions has certain competence that arises from this law [9]. This means that the Building Board is an institution established by the local government and is subordinate to the chairman of the City Council. The head of the Building Board manages and organises the work of the Building Board. The head of the Building Board is appointed and removed from office by the City Council. Internal and external regulatory enactments determine the competences of the Building Board.

To ensure that personnel working at the Building Board act within the limits of the provisions of regulatory enactments and their competences, the Construction Law, which came in effect on 1 October 2014 and series of subordinated regulations of the Cabinet of Ministers must be known. Special emphasis in these regulatory enactments was placed on the process of organising construction works and responsibilities of the involved parties, simultaneously reducing the number of bureaucratic procedures.

Success in construction projects is dependent on the effective organization of multiple, specialized teams, each of which brings its own ability, experience, knowledge and skill towards completing the joint project, but which also bring their own objectives, goals and management styles, which may not be entirely complimentary [6].

Existing buildings in operation, if properly operated, are considered to be safe for people [3]. However, practice proves the fact that, upon the inspection of the buildings on site, reconstruction works, which are not approved by the Building Board and fail to conform to construction norms, are performed.

Considering the development of contemporary technology, changes in the regulatory enactments, more and more attention is paid to safety requirements, while being in the premises [8].

Construction Law describes the duties performed by the Building Board:

1) controls the construction process and conformity thereof to the requirements of this Law and other regulatory enactments that govern construction;
2) provides information on the conditions of territory use and construction, as well as the engineering networks in the territory;
3) informs on the legal basis of the construction in progress and provides the information on the building;
4) reviews applications and makes decisions on the construction idea, as well as checks the execution of the conditions included in the decisions and the content of submitted documents in the amount provided for by the regulatory enactments;
5) reviews the plan of construction supervision;
6) appoints construction inspector for the control of construction at the construction object and determines the schedule of mandatory visits to the construction site. In the event, where the building needs construction supervision, the aforementioned schedule will be drawn up by evaluating the main phases of construction works determined by the construction supervision plan;
7) upon the receipt of information on the non-compliance of the construction product at the construction site with the requirements of regulatory enactments, decides on the need to ask the submitter of the construction idea to assess the effect of incompatibilities on significant requirements set for the building;
8) reviews alternative technical solutions for the provision of the accessibility of environment, if required, by requesting the opinion of the experts of the non-governmental organisations of the respective sector in the cases, where the observation of the technical requirements of construction normative regulations;
9) commissions constructions;
10) reviews applications and makes decisions on the change of the type of use of a building or a part thereof after reconstruction;
11) consults on the procedure of building process;
12) performs other actions associated with the construction process and conformity thereof with the requirements of regulatory enactments;
13) registers construction permits issued by other institutions;
14) consults on the possibilities of building in the respective territory;
15) co-operates with the bureau and institutions that perform the functions of the Building Board in accordance with the procedure provided by general construction normative regulations [9].

The aforementioned normative enactment allows to conclude that the competence of Building Boards is clearly indicated in the Construction Law.

The objective of the Building Board is the development of high quality city space and provision, implementation and control of the legality of the construction process in the administrative territory, in accordance with the spatial plan of the respective territory, construction regulations and other regulatory enactments.

Building Board regulations and Construction Law allow to come to the conclusion that one of the main objectives of the Building Board is to provide the legality of the building process, thus, the Building Board has the duty to set an objective of making arbitrary construction “uncomfortable”.

To ensure that the Building Board acts within the limits of its competence, it requires employees with the education in engineering sciences, construction, architecture, design, spatial planning.

However, basically, to perform their office duties, they must have the appropriated education in the area of construction, as well as building inspectors must comply with the requirements of Cabinet Regulation No. 499 Regulations Regarding Building Inspectors, adopted on 19 August 2014. The requirements for building inspectors have been indicated in the regulation, the procedures for their inclusion or exclusion from the register of building inspectors, as well as the procedure for supervision of professional activities have also been provided.

The employees of Building Board, who adopt regulatory enactments that are binding on natural persons and issue administrative acts on behalf of the Building Board, are officials in accordance with the law On Prevention of Conflict of Interest in Activities of Public Officials. Part Two, Section 4 of the law provides – Also persons who in fulfilling official duties in institutions of a public person have the following rights in accordance with laws and regulations, shall be considered to be public officials: to issue administrative acts; to fulfil supervisory, control, inquiry or punishment functions in relation to persons who are not directly or indirectly subordinate to them.

Definitely, Section 2 of Administrative Procedure Law is also binding on employees of Building Board, as it defines the principal targets of administrative procedure: 1) to ensure the observance of basic democratic, law-governed state principles, especially human rights, in specific public legal relations between the State and a private person; 2) to subject actions of executive power relating to specific public legal relations between the State and a private person to the control of an independent, impartial and competent judicial power; 3) to ensure just, accurate and effective application of the norms of law in public legal relations [9].

When performing their work duties, Building Board employees may not have subjective opinions during decision making process and they must act in accordance with regulatory enactments, therefore, the employees of Building Boards, who make decisions on behalf of the Building Board, are public officials, who must observe the law On Prevention of Conflict of Interest in Activities of Public Officials in order to prevent adoption of subjective decisions.
When Building Board performs its functions and makes decisions that are binding on private entities – natural person, legal entity of private law or a union of such persons [10], the compliance with Administrative Procedure Law must be ensured, while making decisions on the merits or implementing actual actions. Thus, considering the above, the Building Board, its structural unit or its officials are the institution that implements functions provided for by Construction Law.

The Building board, in accordance with the Administrative Procedure Law, initiates administrative cases on the basis of applications, at its own initiative and based on an order of a superior institution or a report of another institution. The institution may also implement actual action. Actual action of the institution - an action in the area of public rights that does not manifest as a legal act and is targeted at the creation of actual consequences, if the private person is entitled for this action, or infringement of subjective rights or legal interests of the person has arisen or may arise as a result of such action. Actions of institution that, independently of the intention of the institution, generate such actual consequences, as a result of which the private person has faced or can face significant infringement of rights shall also constitute an actual action. Procedural actions of an institution [10].

Actual action can manifest in the following cases:

a) Building Board receives an application, which indicates that the addresses wishes to receive a certificate that certifies the absence of the construction on site. Action of the Building Board - the building inspector drives to inspect the object and issues a certificate on the absence of the building on site.

b) A case, where the application with the request to issue a certificate on the status of the new construction has been submitted. Action of the Building Board - the building inspector inspects the object and compares with the construction project approved at the Building Board, if no deviations from the building project are detected at the object, the building inspector shall issue the certificate on the status of new construction.

When the Building Board receives an application, where signs of arbitrary construction are detected, it is referred in the form of a resolution to the Building Administration division, which evaluates on the merits, whether the submitter must provide answer on the merits. The chief building inspector of the Building Board evaluates the facts indicated in the application and performs visual surveying of the object, as well as assesses the information at the disposal of the Building Board. Section 134 of Cabinet Regulation No. 500 General Construction Regulations, adopted on 19 August 2014 provides that a construction inspector must prepare opinion regarding each inspection.

The construction inspector shall prepare an opinion on the visual inspection of the object, where the actual situation at the object is identified, as well as the opinion on the presence or absence of signs of arbitrary building at the object is drawn up. If the construction inspector detects signs of arbitrary building, the administrative procedure for the elimination of the consequences of arbitrary building shall be always initiated at the Building Board.

Simultaneously, a building inspector must evaluate the time period, when arbitrary construction was performed, because Section 239 of Latvian Administrative Violations Code indicates the cases, where administrative violation case cannot be initiated. Most frequently, administrative violation case of arbitrary building cannot be initiated, because the periods indicated in Section 37 of Latvian Administrative Violations Code have expired. Latvian Administrative Violations Code provides that administrative violations case can be initiated no later than within six months since the date, when the violation was committed, but, if the violation was lasting — since the date, when the violation was ceased [13].

The building inspector can also initiate an administrative violation case, if they have received an application containing signs of arbitrary building, upon the receipt of information that point to potential commission of an administrative violation, they shall decide on the initiation of administrative violation case or on the refusal to initiate an administrative violation case.

Thus, a building inspector has three options of initiating an administrative violation case:

1) Upon the receipt of an application – in the form of resolution on the application;
2) In the form of a decision;
3) In the form of an opinion.
Considering the above, the conclusion can be made that, depending on legal situation, two parallel procedural actions may occur: within the framework of an administrative procedure and within the framework of an administrative violation case.

4. Concept of Arbitrary Building
Arbitrary building is the term that refers to construction works that are performed without the construction permit or prior to the moment, when a note regarding the fact that certain conditions have been met is made in the construction permit, confirmation card or explanatory note in the cases, where the respective decision is required in accordance with the regulatory enactments, as well as building works that fail to conform to the construction project and the requirements of the regulatory enactments are classified as arbitrary building. Term arbitrary building also refers to the use of the building or part thereof that does not conform to the type of use indicated in the project, or building works that have been commenced without the respective project documentation, if such is required in accordance with regulatory enactments [9].

The definition of arbitrary building indicated above allows the conclusion that the fact of arbitrary construction can be detected, if particular conditions have occurred. Therefore, arbitrary building – building works:
1) That have been commenced without construction permit or respective project documentation, if such is required in accordance with regulatory enactments;
2) That have been commenced or are performed prior to the date when a note certifying that particular conditions have been met is made in the construction permit, confirmation card or explanatory note, if the respective decisions are required in accordance with the requirements of regulatory enactments.
3) That fail to conform to the building project and requirements of regulatory enactments.

The definition of arbitrary building also indicates that the term arbitrary building refers to the use of the building or part thereof in a way that is different from the type of use indicated in the project. The information above allows the conclusion that the term arbitrary building refers not only to building works that are not approved in accordance with the requirements of regulatory enactments, but, potentially, also to the use of the building in a way that differs from the approved type of use.

In essence, the regulation of the Construction Law also refers to the cases, where arbitrary building is not detected during the process of building works, but later – during the use of illegally built (or non-commissioned) building. In these cases, the legislator has delegated certain competences to the building inspector, upon the detection of the fact of arbitrary building, to suspend further operations at such building site until the decision of the Building Board on the restoration of the previous condition or continuation of construction is made [1]. Therefore, based on the decision, conclusions can be made that arbitrary building is not only construction works performed during the building process, but also buildings or constructions that have already been built or rebuilt during use, which are not commissioned.

5. Implementation of Building Board Competence, while Eliminating the Consequences of Arbitrary Building
The elimination of the consequences of arbitrary building is commenced at the moment, when the Building Board, upon the performance of an inspection, detects the signs of arbitrary building, or a person that has performed arbitrary building (or purchased the real estate, where arbitrary building had been performed) voluntarily submits the respective application to the Building Board.

The construction permit shall not be issued, if the construction idea fails to conform with the municipal spatial plan, local plan and detailed plan, except for the cases, where building idea refers to the object of national interest, if the building idea has not been approved by the owner of the land plot or the owner of the building in the cases, where construction works are planned in the existing building, or where the owner of the land is not informed in the cases, when it is required by regulatory enactments,
if, the building project has not been developed in minimum version in accordance with the requirements of regulatory enactments that govern building sector, except for the cases, where the drafting of the respective building project is not required, if the initial evaluation of the planned building or the environmental impact assessment has not been drawn up in the cases, when it is required by regulatory enactments. When the Building Board has evaluated the submitted building idea in minimal version thereof and detects any of the aforementioned cases, it declines building permit and issues a negative administrative act to the submitter of the building idea, but, if the Building Board fails to detect any of the aforementioned cases, it issues the building permit.

Thus, considering the above, it can be concluded that construction works can be commenced, if the Building Board has made a note in the construction permit certifying that all design conditions included in the permit have been met, the conditions for the commencement of building works have been met and the construction permit has become non-contestable.

At the same time, it must be considered that prior to the issue of a construction permit by the Building Board, the construction inspector shall inspect the site of construction idea implementation to verify that no arbitrary building has occurred at the site.

The note on the conformity with design conditions is one of the pre-requisites for the validity of the building permit in terms of material-law. Meanwhile, since the moment of the promulgation of the building permit, it will take effect in procedural meaning. The note that design conditions have been met is a procedural decision, whereby the institution confirms, whether the construction project conforms to the conditions of the building permit and that the construction works can really be commenced [15].

Issue of an administrative act. Prior to the issue of an administrative act to an addressee, the Building Board, in accordance with Section 66 of the Administrative Procedure Law, must assess the content of necessity considerations and decide on:

1) the necessity of the administrative act for the reaching of a legal (legitimate) objective;
2) the suitability of an administrative act for the reaching of the respective objective;
3) the need for the administrative act, i.e. on whether this objective can be reached by means that are less limiting to the rights or legal interests of the administrative procedure participants;
4) the appropriateness of the administrative act, after comparing the violation of the rights of natural person, benefit for public interests and considering the fact that considerable infringement of the rights of a natural person can be justified only by significant public benefit [10].

When the Building Board has evaluated the information at the disposal of the Building Board and clarified the conditions of the case, as well as heard opinion of the administrative procedure participant, it shall immediately evaluate the conditions of the case and issue:

1) mandatory administrative act, if the applicable legal norm provides that the administrative act must be issued;
2) free administrative act, if the institution has the freedom to act and the issue of an administrative act is useful;
3) administrative act, whereby the issue of favourable administrative act to the submitter is refused, due to the fact that the issue of the administrative act is unjustified or it is not useful;
4) the decision on the termination of the case due to the lack of facts or uselessness, if the case was initiated at the initiative of the institution, including - on the basis of information (complaint) submitted by another natural person [10].

If the institution recognises that arbitrary building occurs at the object, the institution shall decide on the restoration of the previous state or the permission to continue construction. The administrative act of the institution, considering the final conclusion of the institution on the presence or absence of arbitrary building, the duty can be imposed on the person to prepare the building documentation required for the execution of the decision. Thus, the opinion of the building inspector is an intermediate decision” [15].

In the cases, where the building inspector detects arbitrary building, they will suspend the works and draw up the respective opinion, while the institution will adopt one of the following decisions:
1) on the restoration of the previous state, if the building of the particular object in the respective territory is not permitted in accordance with the regulatory enactments or building works were commenced prior to the note in the building permit on the conformity with design conditions – irrespectively of the conditions due to which the respective action was not implemented;

2) on the permission to perform construction works after the compliance with the requirements of the regulatory enactments that govern building, but in the cases, where harm to environment was inflicted as a result of arbitrary building, — after the elimination of the harm in accordance with the procedures of the regulatory enactments that govern environmental protection. If the decision on the permission to perform building works was not implemented within the period indicated by the Building Board, the Building Board may adopt a decision on the restoration to the previous state.

To reduce administrative load, the Building Boards commenced the practice, where the opinion on the inspection of the building includes the decision on the elimination of the consequences of arbitrary building, the Building Board entitles the building inspector to make decisions on the elimination of the consequences of arbitrary building.

Upon making the decision on the elimination of the consequences caused by arbitrary building, the Building Board must evaluate the possibility of deciding on lesser infringement of the rights of the person. Therefore, upon the evaluation of usefulness considerations and commensurability, the conclusion must be made that the most commensurable decision made with the purpose of elimination of the particular arbitrary building is to provide the addressee with the possibility of developing construction documentation for building works at the real estate within the limits of particular procedural period, or to restore the previous legal status of the real estate by granting freedom of action to the addressee to select most appropriate means for the purposes of eliminating the consequences of the particular arbitrary building [16].

Simultaneously, the opinion on the inspection of the building includes the warning on the mandatory execution of the administrative act.

For instance, Building Board of Riga City Council has indicated in its management report that 588 administrative acts regarding the elimination of consequences of arbitrary building were issued by Arbitrary Building Assessment Department (Legal Support Department) of Building Control Division of the Building Board in 2015, 1,038 (opinions as decisions on the elimination of the consequences of arbitrary construction or termination of an administrative case) administrative acts regarding the elimination of consequences of arbitrary building were issued in 2016, while, 1,078 administrative acts regarding the elimination of consequences of arbitrary building (opinions as decisions on the elimination of the consequences of arbitrary construction or termination of an administrative case) were issued in 2017. The number of issued administrative acts demonstrates that the Building Council has increased the rate of combating arbitrary building in the administrative territory of the city of Riga.

Voluntary execution of the administrative act. The addressee of the administrative act shall execute the act voluntarily. Therefore, the Building Board, upon evaluating the usefulness considerations and commensurability, by the administrative act, gives the addressee a possibility of choosing how to eliminate the arbitrary building consequences at their real estate. Thus, the addressee selects whether they will develop building documentation or restore the previous state. If the addressee of the administrative act chooses to return the previous state at the real estate, they will return the previous state at the real estate and inform the Building Board thereof.

Mandatory execution of the administrative act. If the addressee fails to perform voluntary execution, the administrative act can be executed according to mandatory procedure [10]. The Building Board issues an administrative act regarding the elimination of consequences of arbitrary building and immediately includes the warning on mandatory execution of the administrative act. Mandatory execution of the administrative act shall be performed by the institution that has issued the administrative act, namely - the Building Board.

At the same time, attention must be paid to the fact that the costs of mandatory execution of the administrative act shall be enforced on the addressee of the administrative act.
To commence mandatory execution of the administrative act, the Building Board must establish that the administrative act was not executed within the established period of time, as well as that it was not contested and therefore it became irrevocable and has to be executed.

Mandatory execution is implemented in accordance with the conditions of the warning, which could include - the use of mandatory payment or direct force. The executive institution, based on the external regulatory enactment and considering the considerations of usefulness, can select measures for mandatory execution, by changing them until the result is reached. If the administrative act imposes a duty on addressee to perform certain actions or to refrain from certain actions and they fail to perform this duty, mandatory payment may be enforced from the addressee.

Considering the aforementioned, the Building Board must establish that the Building Board possesses insufficient information to issue an executive order and all pre-requisites for imposing mandatory payment on the addressee for the failure to voluntarily execute the administrative act have set in. At the same time, the Building Board invites the addressee to execute the administrative act and eliminate the consequences of arbitrary building at the object, since the payment of mandatory payments imposed by an executive order does not release the addressee from the execution of the administrative act.

The application of mandatory payment sis not an objective in itself, but a means for the provision of the execution of the administrative act. Thus, in every particular case, the usefulness of application thereof must be evaluated. Generally, the fact that the person has commenced the voluntary execution of an administrative act and that this execution cannot be completed due to reasons independent of the intention of such person, could be taken into consideration, when making the decision on the need to impose the mandatory payment and the amount thereof” [2].

Conclusion
The objective of the Building Board is the development of high quality city space and provision, implementation and control of the legality of the construction process in the administrative territory of the local government, in accordance with the spatial plan of the respective territory, construction regulations and other regulatory enactments. Building Board has set objective – to make arbitrary building “inconvenient”.

At the same time, it must be considered that arbitrary building is not only detected during construction works, but also buildings or constructions that have already been built or rebuilt during use, which are not commissioned.

The elimination of the consequences of arbitrary building is commenced at the moment, when the Building Board, upon the performance of an inspection, detects the signs of arbitrary building, or a person that has performed arbitrary building (or purchased the real estate, where arbitrary building had been performed) voluntarily submits the respective application to the Building Board.

Persons, who are not employed in building sector cannot be certain that, upon the purchase of real estate, there are no signs of arbitrary building at the property, therefore the authors would suggest that a note regarding arbitrary building should be included in the land register. Thus, the new owners of the real estate would be informed on the situation at the real estate.

Analysis of the requirements and duties established for the employees of the Building Board, the most important ones are – 1. Competence; 2. objectivity and independence; 3. professional qualification; 4. honesty and ethics; 5. responsibility.

This article is the first part of a series of articles, the second part will analyse the five aforementioned requirements and duties of employees working for Building Boards. More in depth analysis will be given in the part II at article

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