BORDEN, J., dissenting. I disagree with the majority's conclusion that the trial court lacked subject matter jurisdiction because the plaintiff, Elise Piquet, had not exhausted her administrative remedies. I conclude, to the contrary, that there was no viable administrative remedy to exhaust. I also conclude, however, that the judgment should be affirmed, on the ground that the plaintiff's claim, namely, that burial of her husband on her property[1] is an accessory use of the property, is flawed as a matter of law. I therefore dissent from the majority's direction to remand the case for its dismissal and would affirm the judgment on the merits.

I

I turn, first, to the majority's conclusion that the trial court lacked subject matter jurisdiction because the plaintiff had not exhausted her administrative remedies. The basis for this conclusion is that the September 16, 2005 letter from the zoning compliance officer of the defendant town of Chester withdrawing her cease and desist order was a "decision," within the meaning of § 140G.1 of the zoning regulations of the town of Chester, by that officer, from which the plaintiff could have appealed to the Chester zoning board of appeals in order to seek a different legal interpretation of the applicable zoning regulations. In my view, that is too slim a reed to support the majority's conclusion.

I first note that the issue of subject matter jurisdiction was raised sua sponte by this court after oral argument; neither defendant, namely, the town or its planning and zoning commission, had raised such a claim, either in the trial court or in this court. Although, of course, that cannot be determinative of such a question of subject matter jurisdiction, it does suggest a certain frailty in the majority's conclusion when, apparently, those officials who have the responsibility of defending the town's interpretation of the zoning regulations did not think that the plaintiff had failed to exhaust her administrative remedies.

The undisputed relevant facts are as follows. On June 8, 2005, the zoning compliance officer issued her cease and desist order, the purpose of which was to require the plaintiff to disinter her husband's remains from her property. On August 12, 2005, the plaintiff filed her appeal to the zoning board of appeals from that order, seeking "an appeal of the . . . [c]ease and [d]esist [o]rder and a variance regarding private burial" on her property. By letter of September 16, 2005, the zoning compliance officer, after reiterating her position that the zoning regulations did not provide for a private burial on residential property, informed the plaintiff as follows: "I would prefer that the legal issues relating

to your husband's burial on Chester Land Trust property be resolved by the real parties in interest who are yourself, the Chester Land Trust and the Connecticut Department of [Public] Health.

"In order to allow you, the Land Trust and the Department of [Public] Health sufficient time to remedy the situation, whether by your pending application for a Variance or otherwise, I am hereby WITHDRAWING the June 8, 2005 Cease and Desist Order. I am also WITHDRAWING the June 8, 2005 Cease [and] Desist order issued to the Chester Land Trust.

"I must emphasize that the purpose of the Withdrawal is to give the parties time to remedy the violation. If the violation is not remedied, it *may be necessary for me to revisit the matter* and determine *what, if any, further action I would need to take* to appropriately enforce the Chester Zoning Regulations." (Emphasis added.)

Section 140G.1 of the zoning regulations gives the zoning board of appeals the power to "hear and decide appeals where it is alleged that there is an error in any order, requirement or decision made by the [z]oning [c]ompliance [o]fficer . . . ." The letter of withdrawal cannot reasonably be considered a "decision" by the zoning compliance officer. Read sensibly, it was not a "decision" by that officer; it was, instead, at the most, the postponement or deferral of a decision.

As a matter of statutory interpretation, the principles of which apply to zoning regulations; *Hasychak* v. *Zoning Board of Appeals*, 296 Conn. 434, 442, 994 A.2d 1270 (2010); the terms "order, requirement or decision" must be read together. See *Director of Health Affairs Policy Planning* v. *Freedom of Information Commission*, 293 Conn. 164, 171, 977 A.2d 148 (2009). Both "order" and "requirement" strongly suggest an element of command and definiteness that is amenable to the filing of an appeal to the zoning board of appeals, from which the recipient can reasonably understand, after reading the zoning regulations, that her next step is to file such an appeal. Thus, "order" and "requirement" strongly suggest a scenario in which the zoning compliance officer has told the property owner what she must do, and in such a way that she would reasonably understand, from reading the zoning regulations, that her next step is to appeal from that order or requirement to the zoning board of appeals. Indeed, that is precisely what the officer's cease and desist order did. The word "decision," therefore, should be read in the same vein. It should be read as implying an element of command and definiteness that is amenable to the filing of an appeal with the zoning board of appeals and be framed in such a way that the property owner can reasonably understand, from reading the zoning regulations, that her next step is to file such an appeal. The zoning compliance officer's letter of September 16, 2005,

utterly fails this test.

First, it was, by its own terms, a *withdrawal* of her prior order, leaving that order wholly without legal effect. Second, it made clear that its purpose was to give time to the plaintiff, as well as the land trust and the department of public health, neither of which were parties to the plaintiff's appeal to the zoning board, "to remedy the violation." Third, the language used by the zoning compliance officer in notifying the plaintiff of her withdrawal of the cease and desist order was at best ambiguous. She urged the parties—whom she identified as the plaintiff, the land trust and the department of public health—to "resolve" the matter; she did not specifically tell the plaintiff to disinter her husband's remains. This left open, at least, the possibility of a resolution that would not involve disinterment. She then informed the plaintiff that, if the matter were not resolved, "*it may be necessary*" for her to revisit the matter, and then to "determine *what*, *if any*, further action" she would need to take. (Emphasis added.) In sum, this withdrawal of the cease and desist order, leaving that order without any legal effect, cannot reasonably be read as having the elements of command and definiteness suggested by the language "order, requirement or decision" of the zoning compliance officer. It was not a "decision" in any realistic sense; it was, instead, the postponement or deferral of a decision. Finally, it is unfair to the plaintiff to conclude that, having received this withdrawal notice and having read the zoning ordinances, she had been reasonably informed that she must then appeal to the zoning board of appeals from an ambiguous withdrawal of a no longer existing cease and desist order.

Thus, the plaintiff was left in a position in which the only administrative sanction that had been issued—the cease and desist order—had been specifically withdrawn, yet the public official with responsibility to enforce the zoning regulations had expressed her opinion that the plaintiff's burial of her husband's remains violated those regulations and had advised the plaintiff to proceed by seeking a variance from the zoning board of appeals "or otherwise . . . ." As I will explain, the variance route would have obviously been legally ineffective; therefore, the plaintiff took the only route available to her, namely, filing this declaratory judgment action. That was the "otherwise" that the zoning compliance officer had suggested. Given this unusual procedural posture of the zoning compliance officer, it is simply perverse, in my view, to throw the plaintiff out of court on the ground that she failed to exhaust her nonexistent administrative remedies.

Furthermore, it is clear that the zoning compliance officer's uninformed suggestion that the plaintiff seek a variance from the zoning board of appeals would have led the plaintiff into an exercise in futility. It is black

letter administrative law that one need not exhaust an administrative remedy that would be futile. *Garcia* v. *Hartford*, 292 Conn. 334, 340, 972 A.2d 706 (2009); *Neiman* v. *Yale University*, 270 Conn. 244, 258–59, 851 A.2d 1165 (2004). It is equally black letter zoning law that a zoning variance must be based on some unavoidable obstacle created by the property and not on a personal preference of the property owner. *Reid* v. *Zoning Board of Appeals*, 235 Conn. 850, 857, 670 A.2d 1271 (1996). The plaintiff's request for a variance to permit her to bury her husband's remains in her backyard would be the epitome of a personal preference and not an obstacle created by the property.

II

Having concluded that the trial court had subject matter jurisdiction over the plaintiff's declaratory judgment action, I turn now to the dispositive issue of the plaintiff's appeal. The plaintiff claims that the burial of her husband's remains on her residential property can be considered an accessory use incidental to her principal residential use of the property and requests that we remand the case in order to give her an opportunity to prove such an accessory use, an opportunity that she claims the trial court improperly denied her. I reject this claim. I conclude that, as a matter of law, based on public policy, burying one's dead loved one in one's backyard (or front yard, for that matter) cannot ever be an accessory use of residential property in this state.

Section 20A of the Chester zoning regulations defines an accessory use as "[a]ny use which is attendant, subordinate and customarily incidental to the principal use of the same lot." Our case law defines it in similar fashion. See, e.g., *Upjohn Co.* v. *Planning & Zoning Commission*, 224 Conn. 82, 89, 616 A.2d 786 (1992); *Lawrence* v. *Zoning Board of Appeals*, 158 Conn. 509, 511–13, 264 A.2d 552 (1969).

It may be so that in the seventeenth, eighteenth, nineteenth or even early twentieth centuries of this state's history, people incidentally and customarily buried their deceased loved ones on their private residential properties. I do not know if that be so. It cannot be so, however, in the twenty-first century, as a matter of public policy.

Our statutes are replete with regulation of funeral parlors, morticians and burial grounds. See, e.g., General Statutes § 19a-295 (ownership and management of burial grounds); General Statutes § 19a-310 (approval of vault or mausoleum by department of public health); General Statutes § 19a-313 (burials); General Statutes § 19a-320 (maintenance of crematories); General Statutes § 20-212 (care and disposal of bodies by embalmers); General Statutes § 20-220 (requirements for engaging in funeral directing); General Statutes § 20-222 (inspection of funeral parlors by department of

public health); General Statutes § 20-230d (disposition of unclaimed cremated remains). The basis of this extensive statutory scheme is public health. It would be wholly contrary to this important public policy to permit private burials on private, residential property.

Furthermore, consider what would happen when the survivor, who has buried her deceased loved one on her residential property, either dies and the property must be sold, or she wants to sell or can no longer live there and must sell the property. Although *she* may have considered having her deceased husband, say, buried on the property as incidental to *her* use of the property, the buyer—if one can be found—would hardly harbor the same sentiment. Unlike some other incidental use—such as, for example, a tool shed, which a new owner could simply take down if he did not want it—a buried dead body does not easily lend itself to such a solution.

"It is an abiding principle of jurisprudence that common sense does not take flight when one enters a courtroom." (Internal quotation marks omitted.) *Gazo* v. *Stamford*, 255 Conn. 245, 266, 765 A.2d 505 (2001). The assertion of the plaintiff that she should have been given the opportunity to establish that burying her deceased husband on her private, residential property was an accessory use of the property violates that principle.

I would, therefore, affirm the summary judgment of the trial court in favor of the defendants.

[1] The record discloses that the plaintiff is the life tenant of the property involved and that the town of Chester Land Trust, Inc., is the remainderman. The land trust did not challenge the zoning compliance officer's cease and desist order in any way and is not involved in this appeal.