BORDEN, J., concurring. I agree with, and join, the majority opinion, with one exception. I disagree with footnote 8 of the majority opinion to the extent that it suggests that this court may not have subject matter jurisdiction over this appeal. I conclude that we do have jurisdiction, and that any suggestion to the contrary is unwarranted.

First, I note that, despite the suggestion made in the footnote, as a matter of law, the majority has concluded that this court has jurisdiction. That is because the court, after noting what it perceives to be a possible jurisdictional flaw, goes on to decide the case.

It is by now black letter law in this state that the question of subject matter jurisdiction is a question of law; *Simms* v. *Warden*, 229 Conn. 178, 180, 640 A.2d 601 (1994); and, once raised, either by a party or by the court itself, the question must be answered before the court may decide the case. *Dowling* v. *Slotnik*, 244 Conn. 781, 787, 712 A.2d 396, cert. denied sub nom. *Slotnik* v. *Considine*, 525 U.S. 1017, 119 S. Ct. 542, 142 L. Ed. 2d 451 (1998); *Hunnihan* v. *Mattatuck Mfg. Co.*, 243 Conn. 438, 442, 705 A.2d 1012 (1997). Thus, either we have jurisdiction or we do not. It is not a matter

of appellate discretion. Furthermore, the court cannot assume that it has jurisdiction and then go on to decide the case *as if* it did. See *Federal Deposit Ins. Corp.* v. *Peabody, N.E., Inc.*, 239 Conn. 93, 99, 680 A.2d 1321 (1996) ("[w]henever the absence of jurisdiction is brought to the notice of the court or tribunal, cognizance of it must be taken and the matter passed upon before it can move one further step in the cause; *as any movement is necessarily the exercise of jurisdiction*" [emphasis added; internal quotation marks omitted]). If we do have jurisdiction, we may decide the case; if we do not, we may not decide the case and the appeal must be dismissed. *Ramos* v. *Vernon*, 254 Conn. 799, 808, 761 A.2d 705 (2000) ("the court has a duty to dismiss, even on its own initiative, any [portion of the] appeal that it lacks jurisdiction to hear" [internal quotation marks omitted]). Thus, the factors cited by the majority as justification for deciding the case—despite what it considers to be a "strong argument . . . that . . . this court does not have jurisdiction to entertain the city's appeal" (citations omitted)—namely, that the case is ripe, that the claim involved is purely legal, that the record is adequate for appellate review, and that nothing but delay would be served by dismissing the appeal, are simply irrelevant to the legal question of subject matter jurisdiction. Indeed, in many cases in which we are constrained to dismiss appeals on the basis of a subject matter jurisdictional flaw, those same factors are present. See, e.g., *Daginella* v. *Foremost Ins. Co.*, 197 Conn. 26, 495 A.2d 709 (1985).

Second, the majority's suggestion that this court may not have jurisdiction to decide the constitutional issue because the workers' compensation review board (board) did not have such jurisdiction, is contrary to our case law, both in this court and in the Appellate Court. In *Cleveland* v. *U.S. Printing Ink, Inc.*, 218 Conn. 181, 187–88 n.4, 588 A.2d 194 (1991), an appeal from a decision of the board, this court declined to reach constitutional issues precisely because the defendants had not raised them before the board and, therefore, had not properly preserved the issues for appellate review. In *Caldor, Inc.* v. *Thornton*, 191 Conn. 336, 339, 349, 464 A.2d 785 (1983), aff'd, 472 U.S. 703, 105 S. Ct. 2914, 86 L. Ed. 2d 557 (1985), an appeal from a decision of the state board of mediation and arbitration, this court squarely decided a constitutional issue that the board of mediation and arbitration had declined to decide precisely because it had no jurisdiction to do so. In *Hall* v. *Gilbert & Bennett Mfg. Co.*, 241 Conn. 282, 306–309, 695 A.2d 1051 (1997), an appeal from a decision of the board, we declined to decide the facial constitutionality of the same statute that is involved in the present case because of the lack of an adequate factual record. We did not in any way suggest, moreover, that an adequate factual record—which is present in this case—could be created only by way of a separate

declaratory judgment proceeding, as the majority suggests here. The Appellate Court, in appeals from decisions of the board, has considered a constitutional question that had first been presented to the board; *Tufaro* v. *Pepperidge Farm, Inc.*, 24 Conn. App. 234, 236–37, 587 A.2d 1044 (1991); and has decided such a question that was not presented to the board and that the board had no jurisdiction to decide. *Keegan* v. *Aetna Life & Casualty Ins. Co.*, 42 Conn. App. 803, 807–10, 682 A.2d 132, cert. denied, 239 Conn. 942, 686 A.2d 120 (1996).

Third, despite the majority's suggestion that recognizing our jurisdiction in the present case could raise ''practical'' problems, it is the majority's suggestion itself that would do so. I recognize that administrative agencies, such as the board in the present case, have no jurisdiction to consider or decide constitutional questions. That does not mean, however, that, when a litigant appeals to the courts from a case that was properly before such an agency, the *court* does not have jurisdiction to decide the issue. I know of no case or principle of law that suggests such a limitation on judicial subject matter jurisdiction and, as I have indicated previously, our cases are all to the contrary.

Moreover, the lack of administrative jurisdiction to decide a constitutional issue does not mean, as the majority suggests in footnote 8 of its opinion, that the party seeking to have the court decide the question is required to do so only by way of a separate action for a declaratory judgment, rather than in the course of a duly taken appeal from the administrative agency's decision. Such a procedural rule would raise significant practical concerns. It is not unusual for a party, in an administrative appeal to the court, whether from the board as in the present case, or from any administrative agency that is, unlike the board, governed by the Uniform Administrative Procedure Act; General Statutes §§ 4-166 through 4-189; to raise a number of claims, some of which are statutory, and one of which may involve the constitutionality of the statute involved or, indeed, of the procedures employed by the agency itself. The majority would suggest that in such a case, the party could raise the statutory claims in the judicial appeal, but would have to sever the constitutional claim or claims and present them by way of a separate action for a declaratory judgment. This hardly commends itself as wise judicial policy, especially when one considers that ordinarily the court, if presented at the same time with all of the claims, would reach the constitutional claim only if necessary. Thus, the majority's suggestion encourages multiplicity of actions, thus adding an unnecessary burden to our already overburdened trial courts. I would eschew such a policy.