EVELEIGH, J., with whom HARPER and VERTEFEUILLE, Js., join, dissenting. I respectfully dissent. I disagree with the majority's conclusion that the Appellate Court properly concluded that the trial court lacked subject matter jurisdiction in this action for a declaratory judgment because the plaintiff, Elise Piquet, failed to exhaust her administrative remedies. The majority concludes that a September 16, 2005 letter (September letter) from the zoning compliance officer of the defendant town of Chester (town) withdrawing a cease and desist order "constituted a decision from which the plaintiff could appeal to the [zoning board of appeals (board)]." I respectfully disagree. I would conclude that, due to the ambiguity of the September letter, a reasonable person would not have known that it constituted a decision from which the plaintiff could appeal to the board. Furthermore, in order to avoid the uncertainty that litigants face in determining whether an interpretation from a zoning compliance officer is a decision from which they must appeal to the board, I would adopt a rule requiring town zoning officials to include language in any appealable decision identifying it as appealable and clearly identifying the requirements for appeal. Moreover, even if I were to agree with the new test adopted by the majority to determine the appealability of interpretation letters, I would remand the case to the trial court to allow the plaintiff to advance arguments and offer testimony on her behalf as to why the September letter was not an appealable decision under the new test. Finally, if I were to apply the majority's new test to the facts of this case, I would conclude that the September letter was not an appealable decision because the letter was "contingent on future events . . . ." Accordingly, I would reverse the judgment of the Appellate Court and remand the case to that court with direction to reverse the trial court's judgment and remand the case to the trial court for further proceedings.

Because a careful analysis of the facts is critical to an examination of the issue on appeal, I set forth the following relevant facts, as set forth in the majority opinion, the record, and procedural history, necessary for my review. On June 8, 2005, the town's zoning compliance officer issued a cease and desist order (June order), which stated that the town's zoning regulations do not allow for private burials on residential property. At the bottom of the June order, in bold type, the zoning compliance officer stated that, upon receipt of the order, the plaintiff had "[thirty] days to come into compliance with the Chester [z]oning [r]egulations or appeal this decision to the [board]." On August 12, 2005, the plaintiff filed an appeal to the board from the June order.

On September 16, 2005, while the plaintiff's appeal from the June order was still pending, the plaintiff received another letter from the zoning compliance officer. In the September letter, the zoning compliance officer reiterated her position that the town's zoning regulations do not permit private burial on residential property. The zoning compliance officer, however, informed the plaintiff as follows: "I have made the decision, however, that I do not wish to rely upon . . . my interpretation of the [z]oning [r]egulations as the basis of further legal action by me as [z]oning [compliance] [o]fficer at this time. Rather, 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 [d]epartment of [public] [h]ealth.

"In order to allow you, the Land Trust and the [d]epartment of [public] [h]ealth sufficient time to remedy the situation, whether by your pending [appeal] or otherwise, I am hereby WITHDRAWING the June 8, 2005 [c]ease [and] [d]esist [o]rder. I am also WITHDRAWING the June 8, 2005 [c]ease and [d]esist order issued to the Chester Land Trust.

"I must emphasize that the purpose of the [w]ithdrawal 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 [z]oning [r]egulations." (Emphasis added.)

The September letter, unlike the June order, did not contain any language informing the plaintiff of any right to appeal, nor did it provide the plaintiff with any time frame to resolve the matter or come into compliance with the town's zoning regulations.

I

I first address the majority's conclusion that "the September letter unequivocally provided that the zoning compliance officer (1) considered the plaintiff's ongoing use of her land a *violation* of the Chester zoning regulations, and (2) was revoking the previous cease and desist order for the sole purpose of allowing the plaintiff to pursue other remedies for the *violation*." (Emphasis in original.) I disagree, and would conclude that the September letter was ambiguous at best, and thus did not unequivocally constitute a final decision from which the plaintiff would reasonably understand that her next step would be to file an appeal.

A reading of the September letter, in light of the facts as a whole, illuminates the letter's ambiguity, and shows that it is unreasonable for the majority to conclude that the plaintiff should have known that an appeal from the letter would have been proper. The June order was undoubtedly a decision of the zoning compliance offi-

cer, from which a person would have reasonably understood that the next step would be to appeal to the board. At the bottom of the June order—in bold type, and set apart from the rest of the letter—was the advisement: "Therefore, upon receipt of this letter you have [thirty] days to come into compliance with the Chester [z]oning [r]egulations *or appeal this decision to the* [*board*]." (Emphasis added.) Thus, the zoning compliance officer affirmatively identified the June order as an appealable decision. There was no ambiguity, which is evidenced by the fact that the plaintiff did indeed file an appeal with the board from the June order. She understood, as a reasonable person would after reading the order and the applicable zoning regulations, that her next step was to appeal.

Unlike the June order, however, the September letter did not contain any advisement notifying the plaintiff of her right to appeal within thirty days. Furthermore, whereas the June order notified the plaintiff that a cease and desist order was issued against her, the September letter acted as a *withdrawal* of the cease and desist order, leaving the June order wholly without legal effect. Thus, upon withdrawal of the cease and desist order, there was no action or order pending against the plaintiff from the zoning compliance officer. Instead, all that remained was simply language asserting that the plaintiff should attempt to resolve the issue without involvement by the zoning compliance officer.[1] Accordingly, because the plaintiff reasonably believed that there was nothing left to appeal, the plaintiff *withdrew* her pending appeal of the June order. The plaintiff's actions in response to the September letter are worth repeating; receipt of the September letter prompted the plaintiff to withdraw her appeal, rather than file a new appeal. For the majority to hold that, after reading the September letter, the plaintiff should have known to file another appeal, rather than withdraw the appeal that was already pending, in my view, is not a rational interpretation of the September letter. Although the majority relies on the fact that the violation itself was not withdrawn, it cannot dispute the fact that the September letter did not advise the plaintiff that she had further appeal rights. Further, in the September letter, the zoning compliance officer specifically stated that she did "not wish to rely upon the claimed untimeliness of [the plaintiff's] appeal or [her] interpretation of the [z]oning [r]egulations as the basis of further legal action by [her] as [z]oning [compliance] [o]fficer at this time." In my view, it is reasonable to conclude that the zoning compliance officer was not relying on her interpretation of the regulations that established the violation itself. It was certainly a reasonable interpretation that the September letter withdrew not only the cease and desist order, but also the zoning compliance officer's interpretation of the underlying violation.

The ambiguity of the September letter is further evi-

denced by the fact that the town did not raise the issue of subject matter jurisdiction at any point in the proceedings. Rather, the issue was raised sua sponte by the Appellate Court. *Piquet* v. *Chester*, 124 Conn. App. 518, 521 n.2, 5 A.3d 947 (2010). Therefore, in asserting defenses to the current action, the town did not think to raise the issue of subject matter jurisdiction because it did not believe that the plaintiff had failed to exhaust her administrative remedies by failing to appeal from the September letter. Although this is not determinative of the question of subject matter jurisdiction, it does show that a reasonable person would not have understood that an appeal was necessary. See, e.g., *Bozrah* v. *Chmurynski*, 303 Conn. 676, 692–93, 36 A.3d 210 (2012) (reasonable person standard applies to zoning compliance officer's belief that zoning violation exists).[2] As a result, in my view, it is unfair to conclude that, upon receipt of the September letter, the plaintiff was reasonably informed that she was required to appeal to the board in order to exhaust her administrative remedies.

II

Second, as discussed previously herein, I believe that the September letter was ambiguous. Indeed, the present case highlights the uncertainty that is often confronted by parties in land use cases, when deciding how to best protect their interests after receipt of an interpretation by a local zoning compliance officer. Parties constantly rely on letters interpreting local zoning regulations for a variety of purposes. For example, Connecticut courts have examined letters issued by zoning compliance officers which were used: by a contract purchaser of property to determine if a certain use is permitted; *Cortese* v. *Planning & Zoning Board of Appeals*, 274 Conn. 411, 415–16, 876 A.2d 540 (2005); by a homeowner to determine if an addition to their home required a variance; *Pinchbeck* v. *Zoning Board of Appeals*, 58 Conn. App. 74, 77, 751 A.2d 849 (2000); to determine if a particular use fit within a permitted zoning category and, if so, what parking requirement would apply; *Boris* v. *Garbo Lobster Co.*, Superior Court, judicial district of New London, Docket No. 548853 (December 3, 1999), aff'd, 58 Conn. App. 29, 750 A.2d 1152 (2000); and to determine whether the sale of alcohol on a premises would require a special permit. *Macher* v. *Willington*, Superior Court, judicial district of Tolland, Docket No. CV-98-67453-S (June 22, 1999). It is clear, therefore, that a bright line rule for determining what interpretation letters are appealable decisions is necessary.

Even if I were to agree with the rule adopted by the majority that "when a landowner receives notice from a zoning compliance officer that the landowner's existing use of his or her property is in violation of applicable zoning ordinances or regulations, that interpretation

constitutes a decision" that may properly be appealed to the board, I believe, however—and this case shows—that such a test does not suffice to ameliorate the uncertainty that parties face in land use cases. Something more is needed.

Accordingly, I would adopt a rule requiring zoning compliance officers to clearly identify interpretation letters that constitute appealable decisions as such. This can be done simply by including unambiguous language at the bottom of the letter notifying the recipient of her right to appeal, such as the language included in the June order in this case. I note that the Appellate Court has previously held that such letters, while not determinative, represent a factor in determining whether a document constitutes a final decision that starts the running of the appeal period. "In [determining that a zoning compliance officer's certificate was an appealable decision], this court relied in part on the fact that the certificate itself contained language stating that it was appealable pursuant to [General Statutes] § 8-7." *Holt* v. *Zoning Board of Appeals*, 114 Conn. App. 13, 19, 968 A.2d 946 (2009).[3] Such an advisement would certainly be helpful in any determination of finality. Whether an interpretation is an appealable decision should not be a secret. If a zoning compliance officer intends for her interpretation to be an appealable decision, she should say so, and thus provide the recipient with reasonable notice of her right to appeal to the board. Adoption of this rule would provide stability and certainty in this area, and allow parties to easily conclude whether a decision should be appealed, rather than unnecessarily leaving that decision to a later interpretation by the courts.

III

I further respectfully disagree with the majority's adoption of a new test without allowing the plaintiff the opportunity to present evidence regarding that new test. We have previously stated in *State* v. *Winot*, 294 Conn. 753, 762 n.7, 988 A.2d 188 (2010), in reference to our decision in *State* v. *Salamon*, 287 Conn. 509, 531, 949 A.2d 1092 (2008), which changed the law of kidnapping as it related to actions incidental to other crimes, as it related to other cases—namely, *State* v. *DeJesus*, 288 Conn. 418, 426, 953 A. 2d 45 (2008); *State* v. *Sanseverino*, 287 Conn. 608, 612, 949 A.2d 1156 (2008), overruled in part by *State* v. *DeJesus*, supra, 437, superseded in part after reconsideration by *State* v. *Sanseverino*, 291 Conn. 574, 969 A.2d 710 (2009), that "[i]n deciding these cases, we determined that their facts implicated the new rule announced in *Salamon* and, therefore, required reversal of the defendants' kidnapping convictions. . . . We concluded further that the correct remedy was to remand each case for a new trial in which the jury properly would be instructed as to the rule of *Salamon* and the state would have the opportunity to

present evidence and to argue that the restraint involved was not entirely incidental to the defendant's commission of sexual assault." (Citations omitted.) *State* v. *Winot*, supra, 762–63 n.7. Further, in response to the concerns expressed by the dissent in *State* v. *DeJesus*, supra, 438 n.14, we noted that "[w]e agree with the dissent that, given the facts adduced at trial in *Sanseverino*, it was unlikely that the state would have been able to proffer sufficient additional evidence on retrial to satisfy the *Salamon* rule. Nonetheless, it is not the function of this court, as an appellate tribunal, to deprive the state of that opportunity. See *State* v. *Lawrence*, 282 Conn. 141, 156, 920 A.2d 236 (2007) (function of appellate tribunal is to review, and not to retry, the proceedings of the trial court . . .)." (Internal quotation marks omitted.)

We recently followed the same procedure in *State* v. *Drupals*, 306 Conn. 149, 170–73, A.3d (2012), wherein we interpreted a statute for the first time, and allowed the state to retry the defendant, if possible, based upon the new interpretation. I note that a majority of this court failed to follow this procedure in *Duart* v. *Dept. of Correction*, 303 Conn. 479, 492–93, 34 A.3d 343 (2012) when the majority stated that "[a]lthough the trial court analyzed the plaintiff's motion for a new trial according to the standard set forth in [*Teamsters*, *Chauffeurs*, *Warehousemen & Helpers Union*, *Local No. 59* v. *Superline Transportation Co.*, 953 F.2d 17, 21 (1st Cir. 1992)] rather than the [test in *Varley* v. *Varley*, 180 Conn. 1, 428 A.2d 317 (1980)] as rephrased in this opinion, our review of the court's findings leads us to conclude that, even if the court had required a showing of reasonable probability that the result of a new trial will be different, the plaintiff's motion for a new trial could not have prevailed." But see *Duart* v. *Dept. of Correction*, supra, 525 (*Eveleigh* and *Vertefeuille*, *Js.*, dissenting) (would have remanded case to allow parties to present additional arguments in accordance with new framework). I continue to view the effort to analyze what a court would have done under the new test as an exercise that should be left for the trial court upon remand. In this case, for instance, we can not be certain that the trial court would have found that the September letter did not contemplate future actions if the zoning compliance officer had been put on the witness stand and testified that, at the time when the letter was written, she did not consider a violation to exist, and no future action was necessary.

IV

I next turn to the majority's conclusion that the September letter constituted a "clear and definite interpretation of the Chester zoning regulations" from which the plaintiff could have properly appealed to the board. I respectfully disagree. Even if I were to agree with the new test adopted by the majority and agree that it

should be applied to the facts of this case without remanding it to the trial court, which I do not, I would conclude that, under that test, the September letter constituted an interpretation that was contingent on future events, and thus was not appealable.[4]

A reading of the September letter indicates that any action taken against the plaintiff would take place at some indefinite time in the future, if ever. The September letter is replete with contingent language. For example, the zoning compliance officer stated that she was withdrawing the June order so that the plaintiff could attempt to resolve the issue with the department of public health. The letter goes on to state: "I must emphasize that the purpose of the [w]ithdrawal 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 . . . ." (Emphasis added.) Therefore, it is clear that the zoning compliance officer was refraining from making a final determination on the matter until some point in the future. In fact, the zoning compliance officer expressed hope that she would *not* have to make a final determination, as she urged the plaintiff to resolve the problem without her involvement. As such, I would conclude that the September letter was not a decision that could properly be appealed to the board, because the interpretation was "contingent on future events" of which the plaintiff was required to "await a subsequent, final determination . . . in order to appeal to the [board]." This view is further buttressed by the fact that the September letter failed to advise the plaintiff of her appeal rights. Further, the zoning compliance officer stated that she did not wish to rely upon "[her] interpretation of the [z]oning [r]egulations as the basis of further legal action by [her] as [z]oning [compliance] [o]fficer at this time." Therefore, I respectfully disagree that this letter represented a "clear and definite interpretation of the Chester zoning regulations . . . ."

For the reasons stated previously, I respectfully dissent. I would reverse the judgment of the Appellate Court dismissing the appeal and remand the case to that court with direction to reverse the judgment of the trial court and remand the case to that court for further proceedings.

[1] The majority asserts that my interpretation of the September letter "conflates the revocation of the cease and desist order with the zoning compliance officer's interpretation of the zoning regulations." See footnote 15 of the majority opinion. The majority further asserts "[i]t is immaterial that the September letter contained additional language indicating that the zoning compliance officer was not taking action despite the violation because we are concerned solely with the definiteness of the officer's interpretation of the zoning regulations as they pertained to the plaintiff's existing, ongoing use of her land." Id. I disagree. The majority focuses solely on the zoning compliance officer's use of the term "violation" in the September letter, while ignoring the remainder of the September letter. I, however, think it is necessary to examine the letter as a whole.

[2] The majority suggests that my "analysis focuses on the plaintiff's subjective understanding of the September letter." See footnote 15 of the majority

opinion. I disagree. As I have explained herein, I adopt the reasonable person standard.

[3] The majority claims that "the dissent wants zoning enforcement officers to determine the subject matter jurisdiction of the Superior Court through talismanic language in a letter." See footnote 14 of the majority opinion. Contrary to the majority's analysis, as I explain herein, the Appellate Court has relied on such language as a factor in determining whether such a letter is an appealable decision. I recognize that it is ultimately the Superior Court's judgment as to whether such a letter is an appealable decision, but clear language would be an aid to property owners.

[4] Contrary to the majority's food analogy, I do not wish to " 'have [my] cake and eat it too . . . .' " See footnote 17 of the majority opinion. The majority failed to notice that I prefaced my analysis with the following language: "[e]ven if I were to agree with the new test adopted by the majority and agree that it should be applied to the facts of this case without remanding it to the trial court, which I do not . . . ."