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FLYNN, C. J., concurring. I concur fully in the majority opinion. I agree with the plaintiff, Elise Piquet, that the zoning commission's legal argument distilled down to its essence, is that the commission can grant no relief to the plaintiff because its zoning regulation is permissive. I also agree that accessory uses are not defined by the Chester zoning regulations. However, § 20 of the regulations describes a lot as an area capable of being occupied by one principal building "and *the accessory buildings or uses customarily incident to it.*" (Emphasis added.) I further agree with the plaintiff that there was a complete absence of any affidavit or other documentary evidence from the defendants as to what was "customarily incident" attached to the commission's motion for summary judgment filed by the commission and the defendant town of Chester. Without such evidence, there was nothing that the plaintiff had an obligation to rebut.

Nevertheless, because our review is plenary and subject matter jurisdiction may be raised at any time; see *Ross v. Zoning Board of Appeals*, 118 Conn. App. 90, 96, 983 A.2d 11 (2009) (court may act on own motion and should do so when lack of jurisdiction is involved); I therefore concur that the judgment of the trial court should be reversed and the case remanded with direction to dismiss the action because the plaintiff had administrative remedies, to which she did not avail herself.

When the plaintiff apparently inquired of the state department of public health (department) as to what the requirements were for a burial on private property, the department responded in a letter dated January 4, 2005, inter alia, that pursuant to General Statutes § 19a-313, a burial or entombment is prohibited except in an "established cemetery controlled by a municipality, ecclesiastical society or cemetery association, or in a private burying ground or structure approved by the . . . [d]epartment" The letter also stated that the plaintiff needed to verify with her local planning and zoning commission whether there were local requirements that would prohibit the use of her property as a burying ground.

On June 8, 2005, the zoning compliance officer issued a cease and desist order to the plaintiff, specifically stating that the department had made a complaint to the zoning office. The cease and desist order stated that private burials were not permitted on the plaintiff's property, and it ordered the plaintiff to comply with the zoning regulations within thirty days. The plaintiff then appealed from that order to the Chester zoning board of appeals. Because of apparent public outcry, however, the zoning enforcement officer withdrew the

order, and the plaintiff then withdrew her appeal without prejudice.

Thereafter, the plaintiff filed a declaratory judgment action in the Superior Court, seeking a twofold declaration that she had a right to keep her husband buried on the property and that she had a right to be buried there herself after her death. She claimed that these private burials were accessory uses under the Chester zoning regulations. The commission, however, has not ruled on whether the plaintiff's burial requests are permissible as accessory uses under its regulations. The town apparently has no interest in disinterring the plaintiff's husband, as evidenced by its withdrawal of the cease and desist order, and, to the extent that she, understandably, wants to be buried next to her husband on her property, she can seek zoning approval for that purpose. Although the plaintiff argues that making such a request would be futile because the zoning compliance officer already has told her that such uses are not permitted, a zoning compliance officer's opinion, whether official or unofficial, does not end the administrative remedies available to the plaintiff. See General Statutes §§ 8-6 and 8-7.

As explained in *Stepney, LLC v. Fairfield*, 263 Conn. 558, 821 A.2d 725 (2003): "The [exhaustion] doctrine is applied in a number of different situations and is, like most judicial doctrines, subject to numerous exceptions. . . . [W]e have recognized such exceptions only infrequently and only for narrowly defined purposes . . . *Polymer Resources, Ltd. v. Keeney*, 227 Conn. 545, 561, 630 A.2d 1304 (1993); *Pet v. Dept. of Health Services*, [207 Conn. 346, 353, 542 A.2d 672 (1988)]; such as when recourse to the administrative remedy would be futile or inadequate. . . . *Fish Unlimited v. Northeast Utilities Services Co.*, [254 Conn. 1, 13, 756 A.2d 262 (2000), overruled in part on other grounds by *Waterbury v. Washington*, 260 Conn. 506, 545, 800 A.2d 1102 (2002)]. Because of the policy behind the exhaustion doctrine, we construe these exceptions narrowly. See, e.g., *O & G Industries, Inc. v. Planning & Zoning Commission*, 232 Conn. 419, 429, 655 A.2d 1121 (1995) (actual bias, rather than mere potential bias, of administrative body renders resort to administrative remedies futile); *Polymer Resources, Ltd. v. Keeney*, supra, 561 (mere conclusory assertion that agency will not reconsider decision does not excuse compliance, on basis of futility, with exhaustion requirement); *Housing Authority v. Papandrea*, [222 Conn. 414, 432, 610 A.2d 637 (1992)] (fact that commissioner of housing previously indicated how he would decide plaintiff's challenge to voucher program did not excuse compliance, on ground of futility, with exhaustion requirement)." (Internal quotation marks omitted.) *Stepney, LLC v. Fairfield*, supra, 565.

In the present case, the plaintiff cannot circumvent

the administrative process simply because she believes that she will lose at the local level. She had a right to request the local building official to approve her burial site, and if the official decided not to do so, to appeal from that decision pursuant to §§ 8-7 and 8-8 to the zoning board of appeals, which has never passed on the issue and to file an administrative appeal to the Superior Court if the board did not grant relief. If the zoning board of appeals decided that it was an accessory use, then she would have no need to resort to the courts. Declaratory judgment relief was not appropriate at this stage of the case. Accordingly, I agree with the majority opinion to reverse the judgment and remand the case with direction to dismiss the declaratory judgment action.

Finally, I state my agreement with the majority author's decision not to declare judicially as a matter of public policy that interment of persons in private burial plots can never be an accessory use of residential property in this state, as is stated in the dissenting opinion.

At the outset, I note that by enacting General Statutes § 8-2, the General Assembly committed to "the zoning commission" power to regulate within "each such municipality" the "use" of "land" for "residence or other purposes."

The zoning authority of the town of Westport found that private burial plots in a residential zone were an accessory use to residential property owned by one of the nation's prominent families in New York's financial world, and Judge Cocco of the Superior Court agreed with that finding in *300 PRW Associates v. Planning & Zoning Commission*, Superior Court, judicial district of Fairfield, Docket No. CV-91-0288554-S (September 21, 1992) (7 Conn. L. Rptr. 400).¹ What accessory uses customarily are allowed in any given town or city is something best left to each municipality to decide on the basis of the authority granted under § 8-2, other provisions of title 8, chapter 124, of the General Statutes and pursuant to its own regulations. For example, in *Lawrence v. Zoning Board of Appeals*, 158 Conn. 509, 264 A.2d 552 (1969), our Supreme Court stated "whether the raising of chickens and goats was an accessory use—one which was subordinate and customarily incidental to property located in the center of town and used for residential purposes . . . [was] a determination [that was] peculiarly within the knowledge of the local board." *Id.*, 514. The court also explained that "what is meant by accessory use . . . may often present and depend upon questions of fact, or involve or be open to a legal exercise of discretion by the administrative officials and the board of appeals." (Internal quotation marks omitted.) *Id.*, 513.

For all of these reasons I concur in the majority opinion.

¹ In his memorandum of decision, Judge Cocco referenced the commission testimony of Judith Nelson, the director of the Westport/Weston health district, who had stated: “Although this [application for a private cemetery] may not be a common occurrence in Westport, Connecticut, this is a common occurrence in the [s]tate of Connecticut. When I was approached by the family over a year ago about the possibility of a private cemetery on this site, I contacted the [s]tate [h]ealth [d]epartment. There really is a very straight forward series of conditions that [the health department] overlay onto anyone requesting a private cemetery . . . [a]nd from all aspects of public health, I would certainly support this application.”