SCHALLER, J., concurring in part and dissenting in part. I agree with the majority's conclusion that the plaintiff, St. Joseph's Living Center, Inc. (Center), is not entitled to a tax exemption by the defendant, the town of Windham, pursuant to General Statutes (Rev. to 2003) § 12-81 (7).[1] I write separately because I respectfully disagree with the majority's analysis in several respects. Although the majority ultimately affirms the judgment of the trial court on the ground that the Center is not "*used* exclusively" for charitable purposes, it nonetheless takes issue with the trial court's answer to the question of whether the Center was "*organized* exclusively" for a charitable purpose. (Emphasis added.) General Statutes (Rev. to 2003) § 12-81 (7) (providing tax exemption to corporations organized exclusively for charitable purposes for real property used exclusively for charitable purposes). First, in light of the majority's agreement that the Center is not used exclusively for charitable purposes, it is unnecessary to reach the question of whether the Center has been organized exclusively for a charitable purpose. Second, since it did reach that question, I must take issue with the majority's application of the clearly erroneous standard and the manner in which it treats the factual record in this case. Finally, with respect to the majority's conclusion that the chapel qualifies for a tax exemption under § 12-81 (13),[2] I disagree and accordingly dissent from part III of the majority opinion. Upon review of the trial court's decision and the factual record, it is clear that the center failed to establish its case. The record presented on appeal provides no basis for the majority to characterize the chapel as a house of worship or to find that it is owned by a religious organization.

Although it may be useful to clarify the law with respect to these types of tax appeals, I believe this goal should be accomplished in this case without deciding whether the Center was organized exclusively for a charitable purpose. As the majority recognizes, in *Isaiah 61:1, Inc.* v. *Bridgeport*, 270 Conn. 69, 76–77, 851 A.2d 277 (2004), we set forth a five part test to determine whether a subject real property qualifies for a tax exemption under § 12-81 (7) and General Statutes § 12-88. I agree with the majority that the present case raises only the first two prongs of this test. Because the test is conjunctive,[3] however, it is not necessary to reverse the trial court's decision with respect to the first prong when the majority has affirmed the trial court's judgment on the basis of the second prong. See *Briggs* v. *McWeeny*, 260 Conn. 296, 316–17 n.14, 796 A.2d 516 (2002) (court need not reach issue unnecessary to resolution of case). The majority principally asserts that it is necessary to decide the threshold question of

whether the Center is organized for a charitable purpose before it can proceed to the used exclusively prong. I note, however, that the majority's ultimate determination that the provision of short-term rehabilitative care to the general public is not a charitable use is not contingent on determining whether the Center is organized exclusively for some other charitable purpose.[4] Accordingly, I would not reach the issue of whether the Center was organized exclusively for charitable purposes.

In reaching the question of whether the Center was organized exclusively for a charitable purpose, the majority determines, contrary to the trial court, that it was so organized.[5] I disagree with the majority's conclusion that various findings of fact by the trial court were clearly erroneous, and, in particular, with the majority's determination that the factual record supports the *opposite* conclusion. I believe that the majority, in determining that the record supports the opposite conclusion, misapplies the highly deferential clearly erroneous standard of review. That standard of review prohibits the reviewing court from "examin[ing] the record to determine whether the trier of fact *could have reached a conclusion other than the one reached*. Rather, we focus on the conclusion of the trial court, as well as the method by which it arrived at that conclusion, to determine whether it is legally correct and factually supported." (Emphasis added; internal quotation marks omitted.) *Fanny J. Crosby Memorial, Inc.* v. *Bridgeport*, 262 Conn. 213, 220, 811 A.2d 1277 (2002). "A finding of fact is clearly erroneous when there is no evidence to support it . . . or when although there is evidence in the record to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Isaiah 61:1, Inc.* v. *Bridgeport*, supra, 270 Conn. 73.

Furthermore, "[t]he trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . *We cannot retry the facts or pass on the credibility of the witnesses*." (Emphasis added; internal quotation marks omitted.) *Tyler's Cove Assn., Inc.* v. *Middlebury*, 44 Conn. App. 517, 527–28, 690 A.2d 412 (1997). In short, "[t]he conclusions of the trial court are to be tested by [its] finding[s]. *State* v. *Perkins*, 146 Conn. 518, 522, 152 A.2d 627 (1959); *Gorman* v. *American Sumatra Tobacco Corp.*, 146 Conn. 383, 386, 151 A.2d 341 (1959)." *Camp Isabella Freedman of Connecticut, Inc.* v. *Canaan*, 147 Conn. 510, 513, 162 A.2d 700 (1960).

Throughout the majority's analysis of whether the Center has been organized exclusively for charitable purposes, however, it disregards the findings of the trial court and essentially assumes the function of the finder of fact. In doing so, the majority ultimately decides that

the trial court *could* have, and therefore *should* have, reached another conclusion. The majority's review is more akin to de novo review than to the deferential review required by the clearly erroneous standard. In making its alternate findings and conclusions, the majority relies heavily on "undisputed" testimony, which it credits, despite the fact that the trial court neither made such findings nor passed on the credibility of the witnesses on whose testimony the majority relies. "Undisputed" facts are not the equivalent of "found" facts. Our law does not require the finder of fact to accept the testimony of a witness *even if that testimony is undisputed*. *Barrila* v. *Blake*, 190 Conn. 631, 639, 461 A.2d 1375 (1983) ("[a] trier of fact is free to reject testimony even if it is uncontradicted"). Moreover, a fact finder "is equally free to reject part of the testimony of a witness even if other parts have been found credible." Id. Although I will not identify each instance in which I believe the majority has misapplied the clearly erroneous standard of review, I focus my analysis on part I B of the majority opinion, which addresses the question of whether the Center is self-supporting.[6]

With respect to its analysis as to whether the Center is self-supporting, the majority concludes that the trial court's finding that the "Center does not receive, nor is it in need of, outside financial support in the operation of the skilled nursing home facility" was clearly erroneous. The majority's conclusion is based, in part, on its own "findings of fact," which include findings that: (1) the Roman Catholic Diocese of Norwich (diocese) saved the Center up to $120,000 per year in health care costs; and (2) the Center received valuable volunteer contributions, presumably without which the Center could not operate. The trial court neither made such findings nor indicated whether it believed or disbelieved such testimony.

The majority's "finding" with respect to health care cost savings was based on the testimony of Maureen Kolaczenko, the Center's administrator, whose testimony the trial court may or may not have credited. More importantly, this testimony was largely irrelevant to the question before the trial court. The Center appealed the denial of a tax exemption for the tax years of 2003, 2004 and 2005. The diocese's purported savings of up to $120,000 occurred, however, after July, 2006. Our law clearly prohibits reliance on future actions in determining whether an entity is entitled to a tax exemption for the years challenged. See *United Church of Christ* v. *West Hartford*, 206 Conn. 711, 720, 539 A.2d 573 (1988) ("main flaw in the plaintiff's argument is that it is trying to establish a present tax exemption based on future intentions"; activities on tax day are determinative). Even if the trial court had credited this documentary and testimonial evidence, at most it could support only a finding that the diocese saved the Center $30,000 in health care costs in 2005.[7] There was *no*

evidence of any kind regarding the diocese providing health care cost savings for the tax years of 2003 or 2004. It is unclear why the majority indicates that it must limit its analysis of an entity's corporate purpose to the purpose in effect during the tax years challenged, which I agree is proper, but, at the same time, freely relies on financial activity that occurs outside of the relevant tax years. Moreover, Kolaczenko also testified that the Center *is* financially self-supporting, testimony the majority dismisses out of hand. It is unclear how Kolaczenko, who has an undergraduate degree in accounting and an advanced degree in business, can be deemed *qualified* to testify about the Center's health care costs, but, according to the majority, is *not qualified* to testify that the Center is financially self-supporting. See footnote 34 of the majority opinion.[8]

The majority's "finding" with respect to the value of the volunteer contributions is similarly flawed. First, even if we assume that this evidence is accurate, the exhibit on which the majority relies is dated June, 2006. It is unclear from the record, however, whether the Center had a volunteer program in the relevant years of 2003, 2004 and 2005, and, if it did, whether that program existed on a similar scale. Second, no evidence was presented regarding the value of these volunteer contributions, nor is it clear whether those contributions resulted in material cost savings. That is to say, the record does not indicate whether the costs associated with training, organizing and supervising the volunteers outweighed the benefit received. Despite these infirmities, the majority asserts that the Center "does indeed receive valuable in-kind volunteer contributions . . . ."

Finally, the majority's principal reliance on the Center's receipt of outside financial donations to conclude that it is not self-supporting does not warrant a conclusion that the trial court's factual findings were clearly erroneous, if that standard is to have any meaning. At the outset, it is significant that the trial court made no findings with respect to these contributions. Even assuming, however, that the Center's financial statements are accurate in this respect, those statements would support only a finding that in the relevant tax years the Center received outside financial donations of $33,706 in 2003, $30,668 in 2004, and $51,755 in 2005. In applying the comprehensive approach advocated by the majority, with which I agree, these contributions, when viewed in light of the trial court's other findings, more than adequately support the trial court's conclusion. The trial court found that "[t]he . . . Center generates an excess of operating income over operating expenses and for several years made payments to the diocese . . . ." These "voluntary" payments totaled $84,000 in 2003, $84,000 in 2004 and $63,000 in 2005. The Center's voluntary payments, therefore, *exceeded* its receipt of private donations by $50,294 in 2003,

$53,332 in 2004, and $11,245 in 2005. Accordingly, the trial court's finding that the Center was not in need of outside financial support was supported by the record and is not clearly erroneous.[9]

In short, our law requires a reviewing court to evaluate the trial court's conclusions by *the trial court's* findings, and not by the reviewing court's "findings" made on the basis of its own evidentiary review, unfettered by the trial court's findings. See *Camp Isabella Freedman of Connecticut, Inc.* v. *Canaan*, supra, 147 Conn. 513. In reaching an issue that is unnecessary to the resolution of this case, the majority improperly tests the trial court's conclusions on the basis of its own findings. The majority's resolution of this issue, therefore, is based on an evidentiary review of the record that lacks the authenticity of a trial court's fact-finding review. In the process, the majority credits various pieces of undisputed evidence that have not been scrutinized by the trial court. The conclusion—the opposite of the trial court's conclusion—lacks the proper evidentiary foundation. Accordingly, I concur in the result and would affirm the trial court solely on the basis of the second prong pertaining to exclusive use.[10]

With respect to the majority's conclusion that the chapel qualifies for a tax exemption under § 12-81 (13), I respectfully dissent. In denying the plaintiff's claim, the trial court issued a conclusory footnote that stated: "No evidence supports the plaintiff's claim that the use of the chapel for religious purposes exempts the chapel itself from taxation pursuant to § 12-81 (13)." The court further stated, however, that "[b]ecause this appeal contests the denial of a real estate property tax exemption, not an exemption for personal property . . . § 12-81 [13] is inapplicable to the issue in this case." It appears, therefore, that the trial court incorrectly concluded that § 12-81 (13) applies only to exemptions for personal property, despite that statute's explicit reference to an exemption for land.[11] Because the trial court applied an incorrect standard of law, the appropriate remedy is to remand the matter to the trial court for factual determinations on whether the chapel is a house of religious worship and whether the Center is a religious organization, as required for an exemption under § 12-81 (13).

Rather than order a remand, however, the majority engages in what amounts to de novo review of the record to reach the conclusion that the Center qualifies for a tax exemption under § 12-81 (13).[12] Although the majority attempts to explain its actions by characterizing the chapel as a house of worship and by describing the Center as a religious organization, it is clear that the majority is engaging in appellate level fact-finding. First, the majority attempts to support its conclusion by asserting that the trial court's *paraphrasing* of the plaintiff's *claim* is evidence that the trial court implicitly

found that the chapel was a house of religious worship.[13] I cannot agree with the proposition that we can construe a trial court's paraphrasing of a party's claim as the equivalent to a factual finding by the trial court. More importantly, the majority ignores the first part of the trial court's statement—that there is no evidence to support the plaintiff's claim. Second, the majority's fact-finding is based primarily on the self-serving statements by officials from the Center, whom, as I have stated previously, the trial court may or may not have credited. Moreover, to the extent that the majority's findings are based, in part, on the Center's corporate documents, in the absence of any findings by the trial court, we do not know whether the "religious bent" perceived by the majority in those documents was, in fact, put into practice during the tax years in question.

In short, the principal issues before the trial court in this case were whether the Center was organized exclusively and used exclusively for a charitable purpose. Because the trial court misapplied § 12-81 (13), it did not make factual findings as to whether the chapel was a house of worship or whether the Center was a religious organization. Accordingly, the appropriate remedy is to remand the case to the trial court for further proceedings.

For the foregoing reasons, I respectfully concur in part and dissent in part.

[1] See footnote 1 of the majority opinion.

[2] See footnote 5 of the majority opinion.

[3] The first two prongs of the test set forth in *Isaiah 61:1, Inc.* v. *Bridgeport*, supra, 270 Conn. 76–77, provide that "in order for real property used for charitable purposes to qualify for tax exemption under §§ 12-81 (7) and 12-88, the property must: (1) belong to or be held in trust for a corporation organized exclusively for charitable purposes; (2) be used exclusively for carrying out such charitable purposes . . . ." As the majority recognizes, the first two prongs track the language of § 12-81 (7). The statute also connects those two requirements conjunctively with the word "and," which we routinely interpret to require that both conditions must be fulfilled.

[4] The majority offers additional reasons why it is necessary to reach the first prong. See footnote 26 of the majority opinion. First, judicial economy is a worthy goal, but only when the resolution of an issue can be accomplished within the standard of review. More importantly, because each tax appeal is based on the purpose in effect for the tax years in question, any future tax appeals by the Center necessarily must be based on the corporate documents in effect for that particular year, which may or may not be the same as the documents in effect for this appeal. Second, the majority opinion does not clarify the law with respect to the first prong of *Isaiah 61:1, Inc.*, inasmuch as it remains unclear whether a failure to establish one of its three factors, in this case, the self-supporting factor, is fatal to a party's claim.

[5] The majority's discussion, in footnote 27, regarding the "organized exclusively for a charitable purpose" prong, calls into question the statutory analysis. The majority states that part I A of the majority opinion, which looks to a corporation's charter and bylaws to determine whether the entity is organized exclusively for a charitable purpose, is the *sine qua non* with respect to this first statutory prong. The opinion then states that the other factors, discussed in parts I B, I C and I D of the majority opinion, "should be considered under the totality of the circumstances to determine whether the organization is, in fact, fulfilling its charitable purpose." It is unclear, however, whether an entity that satisfies part I A, but fails any or all of parts I B, I C and/or I D, passes the "organized exclusively" prong. If part I A truly is the *sine qua non*, failure to fulfill parts I B, I C or I D should not matter. If that is the case, what is the point of analyzing parts I B, I C or I D? On the other hand, if failure to satisfy parts I B, I C, and/or I D does

matter, part I A would not be the *sine qua non*. Moreover, the practical—or conceptual—difference between fulfilling a charitable purpose and being in furtherance of a charitable purpose is unclear, because the former will now be part of the organized exclusively prong and the latter will be part of the used exclusively prong. Despite the majority's admonition that these analyses should not be confused, confusion seems very likely to occur. The result concerning the organized exclusively prong that the majority goes to such lengths to achieve comes at the cost of sacrificing consistency in the statutory analysis that it strives to clarify in the body of the opinion.

I suggest that it would be more appropriate to analyze the factors discussed in parts I B and I D of the majority opinion, namely, whether the entity is self-supporting and accepts private paying patients, under the "used exclusively" prong rather than the "organized exclusively" prong, whereas the discussion in part I C of the majority opinion, as to whether the entity relieves the state of a burden, should be subsumed within the analysis concerning charitable purpose in part I A of the majority opinion. The majority opinion appears to concede this point, in part, when its asserts that "the notion of 'self-supporting' could just as appropriately be discussed in the exclusive use analysis . . . ."

[6] As the majority observes, we have often held that if an entity is self-supporting it does not serve a charitable purpose. See *Common Fund* v. *Fairfield*, 228 Conn. 375, 383, 636 A.2d 795 (1994); *United Church of Christ* v. *West Hartford*, 206 Conn. 711, 719–22, 539 A.2d 573 (1988); *Waterbury First Church Housing, Inc.* v. *Brown*, 170 Conn. 556, 562–65, 367 A.2d 1386 (1976). It is unclear to me, therefore, even if we assume that the corporate documents establish a charitable purpose, see part I A of the majority opinion, why the trial court's finding that the Center was not in need of outside financial support does not defeat the Center's claim.

[7] The plaintiff's exhibit fifty-three, which purportedly proves that the diocese renders the Center health care costs savings, only lists six monthly credits in the amount of $5000 each for the year 2005.

[8] Surprisingly, in dismissing Kolaczenko's testimony that the Center is financially self-supporting, the majority asserts that "there is no indication that the trial court relied on this testimony in making its finding"—an assertion that applies with equal force to the majority's two "findings."

[9] The majority asserts that whether an entity needs outside support is irrelevant so long as it is "structured in such a way that it is intended to function with the aid of at least some private charitable support." First, I fail to understand how an entity that makes voluntary payments in excess of its receipt of outside contributions is structured to function with the aid of charitable support. Second, by removing any concept of need, the majority enlarges the scope of potentially exempt entities so long as those entities seek out and receive a token amount of outside financial support, which in this case represented the following percentages of total revenue: 0.34 percent in 2003; 0.31 percent in 2004; and 0.53 percent in 2005. I do not contend that entities should be judged on a year-to-year basis. The majority looks only to the receipt of outside voluntary contributions and disregards the fact that the Center makes contributions, itself, in order to determine whether the entity is *structured* to function with the aid of outside support. I contend that an entity that receives a de minimus amount of outside aid is not necessarily *structured* to be nonself-supporting. Whether it is possible to imagine what institutions that would qualify is beside the point. My approach would produce appropriate, not unduly restrictive, results.

[10] Even though I generally agree with the majority's analysis with respect to the organized exclusively prong, I take issue with the majority's indication that, if the Center followed certain hypothetical guidelines, the majority would "be inclined to conclude that such services are within the scope of its charitable purpose as expressed in its corporate charter" and, therefore, presumably to rule in favor of the Center. This portion of the opinion amounts to nothing less than an advisory opinion. *Echavarria* v. *National Grange Mutual Ins. Co.*, 275 Conn. 408, 419, 880 A.2d 882 (2005) ("[w]e have consistently held that we do not render advisory opinions" [internal quotation marks omitted]).

[11] I believe this explains the trial court's statement that "no claim has been made that the chapel has a separate physical existence from the rest of the real estate, including the land." Essentially, the trial court appears to be asserting that no claim had been made that the chapel was personal property, as opposed to real property.

[12] In arguing from the proposition that "[n]o one denies that a portion of the facility is used as a chapel" that the Center is, therefore, entitled to a

tax exemption, the majority unduly broadens the scope of entities that may be entitled to tax exemptions. The majority, of course, disregards for this purpose the Center's failure to establish at the trial court level that it is a "religious organization." That notwithstanding, surely not every physical space designated as a chapel entitles the owner to a tax exemption. The majority's result not only requires it to take on the fact-finding role of a trial court, but also may lead to unanticipated and undesirable consequences for municipalities similarly situated to the defendant in this case.

[13] To reiterate, the trial court stated "[n]o evidence supports the *plaintiff's claim* that the use of the chapel for religious purposes exempts the chapel itself from taxation." (Emphasis added.)