In the Missouri Court of Appeals
Eastern District
DIVISION THREE

THOMAS DEBOLD,	)	No. ED99944
	)	
Plaintiff/Appellant,	)	Appeal from the Circuit Court
	)	of St. Louis County
vs.	)	12SL-CC4208
	)	
THE CITY OF ELLISVILLE AND ITS COUNCIL: ADAM PAUL, MATT PIRRELLO, DAWN ANGLIN, LINDA REEL, TROY PIEPER, ROZE ACUP, AND MICHELLE MURRAY,	)	Honorable David Lee Vincent
	)	
Defendants/Respondents.	)	FILED: August 29, 2013

Before Mary K. Hoff, P.J., Robert M. Clayton III, C.J., and Robert G. Dowd, Jr., J.

PER CURIAM

OPINION

Thomas DeBold (DeBold) appeals from the Order and Judgment of the trial court upholding the final decision of the City Council of Ellisville (City Council) to grant a conditional use permit (CUP) to Wal-Mart, Inc., and the Sansone Group (collectively Wal-Mart) to construct and operate a general merchandise department store in the City of Ellisville (the City). We affirm.

Factual and Procedural Background

This litigation concerns the development of a Wal-Mart within the City. As part of that development, Wal-Mart applied for and was granted a CUP from the City on September 5, 2012.

The CUP that was granted, via passage of Ordinance No. 3083 (Ordinance), is valid for 12 months from the effective date of the Ordinance, which was September 5, 2012.

Prior to the passage of the Ordinance, the CUP was the subject of numerous meetings of the City's Planning and Zoning Commission, Architectural Review Board, and City Attorney, and was the subject of review and approval by the City Planner, the City Engineer, the City's Third-Party Traffic Consultant and Landscape Architect, the City Police Chief, the Missouri Department of Transportation, the St. Louis Metropolitan Sewer District, St. Louis County, and Metro West Fire Protection District. After extensive deliberation and review, the City Council approved the application for a CUP. On July 18, 2012, at the first City Council meeting at which the CUP was discussed, the City introduced 27 documents as public exhibits. These exhibits consisted of hundreds of pages of materials, including numerous studies and reviews by City staff and outside consultants. The City approved the application for a CUP via passage of the Ordinance, first read on August 15, 2012, and second read and passed on September 5, 2012. In a Memorandum to the City's Mayor and City Council, the City's Manager, Kevin Bookout, concluded:

> The project is consistent with the City's adopted Comprehensive Plan and the standards of good planning, as determined by the City Planner, City Engineer, the City's Third-Party Traffic Consultant and Landscape Architect, the City's Planning and Zoning Commission, and the City Council. In addition, the proposed use has been reviewed by the City Police Chief, the Missouri Department of Transportation, the St. Louis Metropolitan Sewer District, St. Louis County, and Metro West Fire Protection District. All of the professional reviewing persons and entities have found the project, as extensively conditioned by the City Council, to be reasonable and appropriate within the scope of their respective jurisdictions and expertise.

On September 19, 2012, DeBold filed an appeal with the City concerning the approval of the CUP. DeBold did not raise any procedural deficiency or irregularity with respect to the

City's decision to grant the CUP. On October 3, 2012, DeBold's appeal was considered by the City and was denied by a vote of the City Council.

DeBold sought judicial review of the City Council's decision. A hearing was held before the trial court on January 30, 2013. The trial court entered its Order and Judgment on February 26, 2013, in which it found that the decision to grant the CUP was supported by competent and substantial evidence upon the record, thereby affirming the City Council's decision. This appeal follows. Additional facts are provided as needed in the discussion section below.

Standard of Review

On review of a grant or denial of a conditional use permit by a municipal agency, we consider the ruling of the municipal agency, not that of the circuit court. Platte Woods United Methodist Church v. City of Platte Woods, 935 S.W.2d 735, 738 (Mo. App. W.D. 1996). The standard of review is whether the agency's action is supported by competent and substantial evidence upon the record. Platte Woods United Methodist Church, 935 S.W.2d at 738; State ex rel. Karsch v. Camden County, 302 S.W.3d 754, 756 (Mo. App. S.D. 2010). In determining whether the administrative action is supported by substantial and competent evidence upon the whole record, we may consider only the record that was before the administrative body. Platte Woods United Methodist Church, 935 S.W.2d at 738.

In addition, the appropriate method of reviewing a city council's administrative decision to grant or deny a special use permit was resolved in Deffenbaugh Industries, Inc. v. Potts, 802 S.W.2d 520 (Mo. App. W.D. 1990). State ex rel. Presbyterian Church of Washington, Missouri v. City of Washington, Missouri, 911 S.W.2d. 697, 701 (Mo. App. E.D. 1995). "The judicial review of a zoning and planning decision by a municipal agency is provided by Section 89.110, and so controls." Presbyterian Church of Washington, Missouri, 911 S.W.2d. at 701 (quoting

Deffenbaugh Industries, Inc, 802 S.W.2d at 524). The trial court does not hear the case de novo, but rather reviews the city council's decision to determine whether it is supported by substantial and competent evidence on the record as a whole. Id.; Chaminade College v. City of Creve Coeur, 956 S.W.2d 440, 442 (Mo. App. E.D. 1997).

Proper Standard of Review

Points I, II, V, VI, VIII, IX, and X address the issue of the proper standard of review in reviewing the City's actions and, therefore, for ease of analysis and reading, will be considered together.

Point I: Standard of Review/Factual Findings and Legal Conclusions

In Point I, DeBold argues the trial court applied the "incorrect, deferential standard of review" and failed to make the required factual findings and legal conclusions. We disagree.

Here, the trial court applied the appropriate standard of review and reviewed the certified record, finding that "competent and substantial evidence" supported the City's decision. Platte Woods United Methodist Church, 935 S.W.2d at 738. The trial court reviewed the certified record "extensively" and considered many hundreds of pages of documents. The trial court then issued an extensive and thorough "Order and Judgment" containing detailed findings and conclusions about every issue in the case, including each of the seventeen factors that govern the granting of a CUP. The trial court made detailed factual findings concerning the City's acceptance of the application and also about the contents of the application itself. The trial court then, as a conclusion of law, found both that the City's actions implied that the CUP application complied with the ordinance and that "there is no clear and convincing, or any, evidence that the application for a conditional use permit was deficient in any way." The trial court applied the

correct standard in reviewing the City Council's decision to approve the CUP and issued findings and conclusions in support of its decision. Point I is denied.

Point II: City Council's Decision Was Supported by Competent and Substantial Evidence

In Point II, DeBold argues the trial court erred in denying his motion for judgment and in finding that the City acted legally in granting the CUP. We disagree.

Here, the competent and substantial evidence in the record indicates that, pursuant to the requirements of City Code Section 400.150(B)(1), each and every property owner signed the conditional use permit application via an "Owner/Applicant/Agent Affidavit" Form.

As under Point I, the scope of review on this issue is limited to determination of "whether the Board's action is supported by competent and substantial evidence upon the whole record…." Karsch, 302 S.W.3d at 756. The evidence is reviewed "in the light most favorable to the council's decision and we may not substitute our judgment for that of the council's." Presbyterian Church, 911 S.W.2d at 701; Village Lutheran Church v. City of Ladue, 935 S.W.2d 720, 722 (Mo. App. E.D. 1996). The City is entitled to the benefit of all reasonable inferences from the evidence and "[i]f the evidence would support either of two different, opposed findings, this Court is bound by the determination of the administrative agency." Karsch, 302 S.W.3d at 756.

City Code Section 400.150(B)(1), entitled *Application Requirements*, provides in pertinent part that, "[i]f an authorized agent or the leaseholder of the use is requesting the conditional use permit, the property owner must also sign the conditional use permit application." Section 400.150(B)(1). DeBold contends that one property owner, the Clarkchester Apartments Association (CAA), did not sign an authorization for the CUP application. However, the certified record reveals the following: (1) there are eight members of

the CAA who own specific Clarkchester apartment buildings; (2) all eight of those members, the unanimous entirety of the CAA, signed "owner/applicant/agent affidavit" forms[1]; (3) the signatures of those who signed the "owner/applicant/agent affidavit" forms include, therefore, each and every director and officer of the CAA.[2]

Consistent with City Code Section 400.150(B), every director, every officer, and every member of the CAA signed a form authorizing Wal-Mart to apply for a CUP. Section 400.150(B) requires only that property owners sign a CUP application. Here, as every member, officer, and director of the CAA explicitly authorized the application for a CUP, the CUP application was complete. The City Council's decision is supported by competent and substantial evidence.[3] Point II is denied.

Point V: Chapter 89 Judicial Review

In Point V, DeBold argues the trial court erred in applying Chapter 89, which DeBold claims applies only to judicial review of an action by the Board of Adjustment, and instead Chapter 536 provides the correct standard of review of an administrative decision by a city council. We disagree.

[1] The signatures included: (1) Mr. and Mrs. Marsilio, (2) Mr. and Mrs. Kumpis, (3) Mr. and Mrs. Massey, (4) Manage Co., LLC, (5) Reinhilde H. Feller, (6) Mr. and Mrs. Hoffman, (7) Gregory Folsom, and (8) Bayer Real Estate.

[2] Mr. Marsilio, President and Director; Ray Bayer Jr. of Bayer Real Estate, Vice-President and Director; Carl Hoffman, Secretary/Treasurer and Director.

[3] In his Reply Brief, DeBold re-asserts that the CAA is the owner of record for the parcels within the Project Area, including the common ground, but that the record does not contain an Affidavit from the CAA and, therefore, the CUP application is incomplete. As expressed above, for the purpose of satisfying Section 400.150(B), every member, officer, and director of the CAA signed a form so providing. Therefore, for all intents and purposes, all property owners within the Project Area signed the CUP application. As the City correctly argues, "this attempt to exalt form over substance is not supported by the City Code."

Here, the trial court determined that the City Council's grant of a CUP should be reviewed pursuant to Section 89.110 RSMo 2000,[4] and despite DeBold's assertions to the contrary, it is well-settled law that review of a city's decision to grant a CUP proceeds under Section 89.110. See Deffenbaugh, 802 S.W.2d at 524 (considering an action by a city council with respect to a conditional use permit and holding that Chapter 536 only applies when another more specific statute does not, and that Section 89.100 is a more specific statute that applies to conditional use permits); see also Presbyterian Church of Washington Missouri, 911 S.W.2d at 701; Village Lutheran Church, 935 S.W.2d at 722; Platte Woods United Methodist Church, 935 S.W.2d at 735; Chaminade College Preparatory, Inc., 956 S.W.2d at 441-42; Nigh v. City of Savannah, Mo., 956 S.W.2d 451, 453 (Mo. App. W.D. 1997); State ex rel. Gannett Outdoor Co. of Kansas City v. City of Lee's Summit, 957 S.W.2d 418-19 (Mo. App. W.D. 1997); State ex rel. Jackson v. City of Joplin, 300 S.W.3d 531, 534-35 (Mo. App. S.D. 2009); Karsch, 302 S.W.3d at 756 (all finding that Chapter 89 controls with respect to city council action on a CUP).

Under this deferential standard, "[t]he scope of review is limited to a determination of 'whether the . . . action is supported by competent and substantial evidence upon the whole record….'" Karsch, 302 S.W.3d at 756. So long as the decision is supported by competent and substantial evidence in the record, the trial court "is bound by the . . . determination and it is irrelevant that there is supportive evidence for a contrary finding." Id. at 762.

The deferential standard of review is the result of the judicial recognition that "zoning often involves questions of sensitivities and perceptions which are appropriate for political rather than judicial resolution." Chaminade, 956 S.W.2d at 442. The evidence is reviewed "in the light most favorable to the council's decision and we may not substitute our judgment for that of the

[4] Unless otherwise indicated, all further statutory references are to RSMo 2000.

council's." Presbyterian Church, 911 S.W.2d at 701; Village Lutheran Church, 935 S.W.2d at 722. The City Council is entitled to the benefit of all reasonable inferences from the evidence and "[i]f the evidence would support either of two different, opposed findings, this Court is bound by the determination" of the City Council. Karsch, 302 S.W.3d at 756. The City Council's decision may only be overturned if it "is clearly contrary to the overwhelming weight of the evidence" and the decision "carries with it a strong presumption of validity which cannot be overcome by anything short of 'clear and convincing evidence.'" Gannett Outdoor Co. of Kansas City, 957 S.W.2d at 419.

The plain language of Section 89.110 states that "Any person or persons jointly or severally aggrieved by any decision of . . . any officer, department, board or bureau of the municipality, may present to the circuit court of the county or city in which the property affected is located a petition…." Therefore, a review of a decision of the City Council, which is a "department, board, or bureau of the municipality," fits within the plain language of Section 89.110. See Presbyterian Church of Washington, 911 S.W.2d at 700, fn. 6 (specifically emphasizing the "department, board, or bureau of the municipality" portion of the statute in finding that Section 89.110 applies to reviews of CUP decisions made by a city council and is not limited only to boards of adjustment).[5] Point V is denied.

Point VI: No Requirement for City Council to Make Its Own Findings of Fact and Conclusions of Law

[5] All the cases cited by DeBold are contrary to the standard enunciated in Deffenbaugh and its progeny in which Chapter 89 has been applied to the review of city council action on CUPs. See Presbyterian Church of Washington Missouri, 911 S.W.2d at 700; Platte Woods, 935 S.W.2d at 738; Chaminade, 956 S.W.2d at 442; Gannett Outdoor Co., 957 S.W.2d at 419; Village Lutheran Church, 935 S.W.2d at 722; Karsch, 302 S.W.3d at 756; City of Joplin, 300 S.W.3d at 534-35.

In Point VI, DeBold argues the trial court erred in following Chapter 89 and therefore the case needs to be remanded to the City Council to make its own findings of fact and conclusions of law. We disagree.

Chapter 89, which is the applicable standard, "does not require a municipal agency to make written findings of fact and conclusions of law." Platte Woods, 935 S.W.2d at 738, fn. 3; City of Joplin, 300 S.W.3d at 537 (rejecting the argument that the Chapter 536 requirement of findings of fact and conclusions of law applies in a case governed by Chapter 89). The trial court articulated this clearly in its Order and Judgment. As set out above, Chapter 536 does not apply to this matter; therefore, under Chapter 89, the City Council was not required to issue findings of fact and conclusions of law. Point VI is denied.

Point VIII: Procedural Irregularities in the CUP

In Point VIII, DeBold argues the trial court erred in denying his offer of proof concerning procedural irregularities in the CUP application under either Chapter 89 or Chapter 536 and should have been allowed to offer evidence outside of the certified record concerning these "procedural irregularities." We disagree.

When the review of a city's decision concerning a CUP proceeds, as here, under Chapter 89, the trial court may review only the certified record and not any additional evidence. See Presbyterian Church, 911 S.W.2d at 697; Platte Woods, 935 S.W.2d at 738; Chaminade, 956 S.W.2d at 442; Gannett Outdoor Co., 957 S.W.2d at 416; Village Lutheran Church, 935 S.W.2d at 722; Karsch, 302 S.W.3d at 756. Therefore, in the instant case, the trial court did not err in denying DeBold's attempts to introduce evidence other than the certified record. Moreover, DeBold failed to properly plead any procedural irregularities before the City and before the trial court and, therefore, was not entitled to introduce such evidence at trial. Point VIII is denied.

Point IX: City's Motion to Supplement Record

In Point IX, DeBold argues the trial court erred in granting the City's motion to supplement the certified record because he was not given an opportunity to test the authenticity of the one supplementing document, the "Owner/Applicant/Agent Affidavit Form" signed by Gregory P. Folsom (Folsom Affidavit), and was thereby prejudiced. We disagree.

Here, the City supplemented the record with the Folsom Affidavit. The City Clerk certified in her own affidavit, to which was attached the Folsom Affidavit, that the Folsom Affidavit was a part of the certified record but had been inadvertently omitted from the other documents previously provided to the Court.

Section 490.240 provides that "[A]ny printed . . . volume, purporting to be published by authority of any . . . town or city, and to contain the ordinances, resolutions, rules, orders or bylaws of such town or city, shall be evidence, in all courts and places within this state, of such ordinances, resolutions, rules, orders or bylaws." Section 490.240. "Where records are kept of municipal acts and proceedings, the law is clearly defined that the same are receivable in evidence of the truth of the facts recited; and it would seem to be a rule that when so produced they establish themselves, because they are made by accredited agents, are of a public nature and notoriety, and are usually made under the sanction of an oath of office." State ex inf. West ex rel.Thompson v. Heffernan, 148 S.W. 90, 93 (1912); see also Kansas City v. Brown, 227 S.W. 89, 93-94 (Mo. 1920). Therefore, when records of a municipality's proceedings, certified by the city clerk, are presented to the court as evidence, their authenticity is not in dispute. Likewise, here, it is undisputed by that the certified record was the record of the municipal proceedings regarding the Wal-Mart development. Regarding the Folsom Affidavit specifically, the certification signed by the City Clerk states that the one page document attached thereto "is part

of the Certified Record and was in the City's possession." She attested that it was part of the "records and transcripts of the City of Ellisville compromising (sic) the proceedings for the Ellisville City Council's consideration and approval of Ordinance No. 3083, being a conditional use permit…." As such, based on the statute and law cited above, DeBold was not prejudiced by the lack of opportunity to test the authenticity of the Folsom Affidavit because the authenticity of the Folsom Affidavit was not at issue.

Assuming *arguendo* that authenticity was at issue, DeBold had the opportunity to challenge the authenticity of the Folsom Affidavit when he was granted leave to conduct discovery after the judgment was entered. DeBold chose not to depose Mr. Folsom, despite this opportunity for post-judgment discovery. Point IX is denied.

Point X: Sufficiency of the CUP Application

In Point X, DeBold argues the trial court erred in finding that the application for the CUP met the requirements of City Code Section 400.150(F) and that the application was supported by competent and substantial evidence. We disagree.

As the City correctly asserts, DeBold's brief fails to address thirteen of the seventeen requirements set out in the Ordinance relating to the granting of a CUP and, therefore, waives any argument that there is no competent and substantial evidence on those factors. See Real Estate Investors v. Am. Design Group, 46 S.W.3d 51, 59 (Mo. App. E.D. 2001) ("[a]rguments raised in points relied on that are not supported in the argument portion of a brief are deemed abandoned and present nothing for appellate review"). With respect to the factors mentioned in his brief, there was competent and substantial evidence to support the City Council's approval of the CUP.

A. Traffic Conditions. With respect to City Code Section 400.150(F)(1)(a), "any negative effect upon traffic conditions," there was competent and substantial evidence to support the City Council's decision.

The evidence presented before the City included the October 2011 "Trip Generation and Distribution Technical Memo" prepared by a consultant, whose purpose was to "accurately forecast traffic volumes within the study area…." The City's third-party consultant reviewed the "Trip Generation and Distribution Technical Memo" as did the St. Louis County's Highway and Traffic Public Works that found, "[t]he stated assumptions appear to be reasonable as the basis of the traffic impact study for this proposed development."

In March 2012, the consultant developed another "Traffic Impact Study," consisting of several hundred pages and intended to "determine the impacts of a proposed development on a network of roadways in Ellisville, Missouri." That study concluded that the proposed development had only "a limited impact on the area roadway network" and that "the proposed Wal-Mart Supercenter with the proposed roadway improvements associated with this development will accommodate future traffic demands with average delays within MODOT requirements and will have a net positive safety impact on Manchester Road."[6]

[6] There was also testimony before the City that showed, with proposed improvements, crashes could be expected to drop 50% to 60% and delays on Manchester Road would be decreased. In addition, there was evidence that signals and elimination of curb cuts associated with the development would significantly improve traffic patterns and that the development proposal is consistent with the City's Great Streets Master Plan. Finally, the City received testimony concerning the lack of any negative effect on traffic conditions and the various mechanisms included in the plan meant to mitigate any traffic concerns, all of which were reviewed and consented to by MODOT, St. Louis County, and the City's traffic consultant.

Given the review by City staff, City consultants, and other consultants, two traffic studies, and all of the other competent and substantial evidence in the record, the City's decision that there are no adverse traffic effects is supported by competent and substantial evidence.

B. Good Planning Practices. With respect to City Code Section 400.150(F)(1)(j), that the development "is compatible with surrounding uses and the surrounding neighborhood," there is substantial and competent evidence supporting the City Council's decision.

The area in which the development will occur is, and has been for many years, zoned as C-3 commercial. Several of the types of commercial development allowed in a C-3 commercial area are not different from a Wal-Mart store. The area includes previous commercial development in the form of vacant car dealerships. The City's Land Use Plan previously contemplated retail commercial development in the area and the City's Comprehensive Plan identified the area as a potential redevelopment area. The development also complies with and furthers the plan previously adopted in the City's Great Streets Master Plan. Furthermore, the proposed development is similar in size to existing retail centers to the north and east of the area. There was testimony that the development would benefit a neighborhood of primarily seniors within walking distance of the proposed development and keep down those residents' grocery costs.

Furthermore, there was evidence that the proposed development would not negatively impact traffic, would not increase fire hazards, would increase stormwater capabilities and water quality at the site, would lead to improved utilities, would result in environmental contaminants being cleaned up, would discourage crime through the use of bright lighting, manned store entrances, and surveillance cameras, would increase the City's revenue, and would catalyze further development within the City. Given these facts in the record, the City properly

concluded that the proposed development, which also included approved landscaping, a trail, and increased setbacks, is not incompatible with the surrounding uses or the surrounding neighborhood.[7]

C. Redevelopment Area. With respect to City Code Section 400.150(F)(1)(o), that the development "complies with standards of good planning practices," there is substantial and competent evidence supporting the City Council's decision.

The City found that, consistent with its Comprehensive Plan, "all the subject properties have been identified as potential Redevelopment Area…. The Manchester and Clarkson redevelopment area represents a long-term catalyst for the City and the possibility of replacing an underperforming use with a use that may generate a greater amount of activity and value."

The competent evidence in the record included the following: that the City had evidence before it that over 40% of the area consisted of vacant, older buildings that do not meet current code requirements; that the development would benefit a neighborhood of primarily seniors within walking distance of the proposed development and keep down those residents' grocery costs; that the proposed development would not negatively impact traffic, would not increase fire hazards, would increase stormwater capabilities and water quality at the site, would lead to improved utilities, would result in environmental contaminants being cleaned up, would

[7] In addition, there is competent and substantial evidence that the City and the developer made mitigating efforts to ensure that the development caused no adverse effect, including: extensive visual screening and sound buffers for trash compactors and truck loading and unloading, as well as loading/unloading procedures meant to curb noise; a requirement that cardboard bailing is done inside the store; the proposed building is set back 400 feet from the street and set back further than the minimum requirements on all sides "thereby adding needed buffering to abutting properties"; ensuring that the retail store had no external public address system; the City's third-party landscaping consultant issued a report that concluded by mentioning the developer's "commendable effort" and stated that "[t]he resultant landscape plan meets and/or exceeds the minimum requirements set forth in the City's Ordinance."

discourage crime through the use of bright lighting, manned store entrances, and surveillance cameras, and would increase the City's revenue. The City found that this was a commercial development, which complies with the Land Use Plan's designation of the area as intended for retail commercial. The City also specifically found that the proposed project is consistent with the City's Comprehensive Plan and will feature many of the attributes envisioned as part of the Great Streets Master Plan. As the City Manager summarized: "All of the professional reviewing persons and entities have found the project, as extensively conditioned by the City Council, to be reasonable and appropriate within the scope of their respective jurisdictions and expertise." Given these facts in the record, the City Council properly concluded that the proposed development is consistent with good planning practice.

D. Commercial Area. With respect to City Code Section 400.150(F)(1)(k), that "the development is appropriate and reasonable in relation to adjacent buildings and the surrounding neighborhood," there is substantial and competent evidence supporting the City Council's decision.

The area in which the development will be built has been zoned commercial for many years. There is previous commercial development in the area, the City's Land Use Plan previously contemplated retail commercial development in the area, and the City's Comprehensive Plan identified the area as a potential redevelopment area. The development also complies with and furthers the plan previously adopted in the City's Great Streets Master Plan. Furthermore, there was evidence before the City that "the proposed development is appropriate and reasonable in relation to the surrounding commercial neighborhood and the Manchester Road commercial corridor." There was additional evidence that on the north side of Manchester Road is a similarly-sized (157,500 square feet) retail development. There is competent and

substantial evidence in the certified record that demonstrates that the proposed use is reasonable and appropriate.

E. CUP Factors and Findings

Finally, concerning City Code Section 400.150(F)(1)(j)-(q), DeBold argues that "the Council reached no findings with regard to several elements required by City Code" and that the Ordinance "makes no reference at all" to some factors related to a CUP.

A review of the certified record indicates that the City Council considered each of the seventeen factors set out in the City Code and found that all factors and requirements were met. The City Council's decision is supported by competent and substantial evidence. Point X is denied.

Waiver

Points III, IV, and VII address the issue of waiver and, therefore, for ease of analysis and reading, will be considered together.

Point III: Procedural Irregularities

In Point III**,** DeBold argues the trial court erred in holding that he failed to adequately plead procedural irregularities before the trial court. We disagree.

Questions concerning whether a petition sufficiently states a claim in a civil case is a pure question of law and is therefore reviewed de novo by the appellate court. See State ex rel. Nixon v. American Tobacco Co., Inc., 34 S.W.3d 122, 134 (Mo. banc 2000). Additionally, Missouri has long held that a party aggrieved by the action of an agency must exhaust his or her administrative remedies before resorting to an action at law or in equity. Drury Displays, Inc. v. City of Richmond Heights, 922 S.W.2d 793 (Mo. App. E.D.1996).

Here, DeBold claims that he properly pled a claim for procedural irregularities before the trial court but, even if he did, he failed to identify and/or raise any procedural irregularity before the City Council. Moreover, it is inaccurate that DeBold could not have known about a procedural irregularity prior to filing litigation and receiving the certified record. Every document related to an allegation of procedural irregularity and the CUP application was provided by the City to all as a public record in the first City Council meeting, on July 18, 2012, at which the CUP was discussed. During that meeting, the City introduced 27 documents as public exhibits. The application for a CUP was one of the public exhibits. The "owner/applicant/agent affidavit" forms, of which DeBold now complains, were included in one of the public exhibits.

As the record demonstrates that DeBold had every opportunity to raise any alleged procedural problem because every document and information necessary to do so was made available to him months before he filed his lawsuit, DeBold has failed to exhaust his administrative remedies and thus is not now entitled to judicial review. Point III is denied.

Point IV: Exhaustion of Remedies

In Point IV**,** DeBold argues the trial court erred in holding that he failed to exhaust his administrative remedies and in finding that any claim of procedural irregularity was barred because DeBold's appeal to the City never mentioned any procedural issue. We disagree.

Where a question of exhaustion and, accordingly, subject matter jurisdiction is based on facts that are uncontested, the court's review is de novo. See Ford Motor Co. v. City of Hazelwood, 155 S.W.3d 795, 798 (Mo. App. E.D. 2005).

Here, the City Code outlines a specific procedure for appeal with respect to the City's decisions concerning a CUP. That procedure is set out in Section 400.150(K) of the City Code and provides as follows:

> *Appeals.* An aggrieved party may, within fifteen (15) days of the decisions for which redress is sought, file with the City Council a written request for reconsideration and appeal of any decisions of the City Council under this Article. The written request for reconsideration must set forth in a concise manner the decision being appealed and **all** grounds known to the appellant as to wherein and why the decision is allegedly in error. [Emphasis added.]

Based on our review of DeBold's appeal to the City, there is no mention whatsoever of any procedural deficiency or irregularity. While containing some detail as to some factors that relate to the granting of the CUP, there is no specific challenge to the CUP application with respect to any "procedural irregularity." As such, DeBold failed to exhaust his administrative remedies and, in the context of review of city zoning decisions pursuant to Chapter 89, issues that were not raised before the city are waived and cannot be considered on appeal. See Zwick v. Board of Adjustment of the City of Ladue, 857 S.W.2d 325, 327-328 (Mo. App. E.D. 1993) (finding no error where petitioner failed to raise the point with the city initially); Drury Displays, Inc., 922 S.W.2d at 793. Point IV is denied.

Point VII: Motion to Continue Trial

In Point VII**,** DeBold argues the trial court erred in denying his verified motion to continue the trial date because he was not given reasonable time to review the certified record and that he was prejudiced thereby. We disagree.

A trial court's decision to grant or refuse a continuance is a matter of judicial discretion and is not to be set aside unless that discretion is shown to be "abused by arbitrary or capricious exercise." Commerce Bank of Mexico, N.A. v. Davidson, 667 S.W.2d 474, 476 (Mo. App. E.D.1984). This discretion necessarily is broad; on appeal the trial court's decision is given every

possible intendment and will not be set aside unless shown to be abused by arbitrary or capricious exercise. Id.

Here, DeBold's assertions that he did not have access to the documents and information that comprised the certified record until twenty-three days before the trial on this matter is not persuasive. Contrary to DeBold's assertions, he did not need to wait for the City to compile the certified record and serve it on him before obtaining and reviewing the evidence relied upon by the City in issuing the permit. As public records of the City, these documents were available to any member of the public, from and after the July 18, 2012, meeting, when the City held its first of several public hearings on the CUP application. Moreover, DeBold was actively involved as an opponent of the CUP development, had access to these public documents, and attended and participated in several City hearings regarding the development. The record shows that DeBold had months to review the public record evidence considered by the City in preparation for his lawsuit and that he received all of the certified record on December 28, 2012. We find no abuse of discretion in denying the motion to continue. Point VII is denied.

Conclusion

The judgment is affirmed.