I. INTRODUCTION

Richard P. McKee sought writ of mandate and injunctive and declaratory relief against the San Francisco Bay Area Rapid Transit District (BART) Board of Directors (board) for an alleged violation of the open meeting provisions of the Ralph M. Brown Act (Brown Act) (Gov. Code, § 54950 et seq.)\(^1\) in signing a letter to a federal agency that affirmed, in response to an inquiry from that agency about a prior board decision, the board’s commitment to that decision. McKee appeals from a judgment denying all requested relief, and we affirm the judgment.

II. BACKGROUND

The case concerns federal transit funding under the American Recovery and Reinvestment Act of 2009 (ARRA) (49 U.S.C. § 53) for BART’s Oakland Airport Connector Project (the project) extending BART train service directly to Oakland

\(^1\) All undesignated further section references are to the Government Code.
International Airport in place of existing AirBART bus shuttle service. On April 23, 2009, the board adopted a resolution authorizing its general manager to apply to the Metropolitan Transportation Commission (MTC) (the metropolitan planning organization for the affected San Francisco Bay counties) for $70 million in ARRA funding. It did so in compliance with the Brown Act and, in January 2010, submitted to the Federal Transit Administration (FTA) a “Title VI, Environmental Justice, and Limited English Proficiency Analysis of Proposed Service and Fare Changes” (the Title VI report) (see Civil Rights Act of 1964, 42 U.S.C. § 200d et seq.).

By a letter of January 15, 2010 (the Rogoff letter), FTA Administrator Peter M. Rogoff wrote to MTC Executive Director Steve Heminger and BART General Manager Dorothy Dugger expressing concerns regarding MTC’s and BART’s pursuit of federal funding for the project, given time limitations for pursuing the funding, results of a Title VI compliance review that had revealed failure to conduct an “equity evaluation” of service and fare changes, and now, an initial review that found the problem uncured by the Title VI plan that BART had just submitted. “In light of this development,” Rogoff wrote, “MTC and BART are now in danger of losing federal funding for the project, including [ARRA] funds. MTC and BART must now face a choice between continuing to pursue federal funding for the Project (which will require immediate corrective action of the Title VI non-compliance) or committing the ARRA funds to alternative projects within the Bay Area.” Given a looming deadline for FTA grants of ARRA funding, Rogoff inquired whether MTC and BART “wish[ed] to continue pursuing federal funding for the Project.”

2 All undesignated further dates are in 2010.

3 After outlining compliance problems and needed remedial action, the Rogoff letter advises: “The above option involves considerable risk to the $70 million in ARRA funds currently programmed by FTA for the Project. ARRA requires FTA by March 5, 2010, to withdraw from each urbanized area or State any unobligated funds. By law, those funds must be redistributed to other urbanized areas or States that have not had funds withdrawn. Even should BART submit a timely action plan acceptable to FTA, BART’s implementation actions will certainly extend beyond the March 5, 2010
The BART response is what McKee claims is a Brown Act violation. Rogoff addressed his letter in part to BART General Manager Dugger, and there is no dispute that Dugger, by virtue of her authority under the 2009 resolution, could have responded alone. McKee’s counsel conceded as much below. Dugger responded in a letter of January 20 to Rogoff (with “cc” to MTC Executive Director Heminger), but eight of the nine board members ultimately signed the letter as well. Both parties agree on appeal with the trial court’s characterization of the excess as meant “to put a little bit of political punch behind” the letter and stress BART policy.

The letter started by affirming BART’s intent “to continue to pursue federal funding for the [project],” and went on to declare BART’s commitment to civil rights generally, and to working with FTA’s Office of Civil Rights to rectify, as soon as possible, all problems identified in Rogoff’s letter.4

deadline. If BART were to fail in any respect to make progress or to meet its deadlines as established in the action plan, FTA would have to de-obligate the ARRA funds for the Project and would be prohibited by law from re-obligating those funds to alternative projects in the San Francisco Bay area.

“Should MTC and BART decide instead to pursue the other alternative of not seeking federal funding for the Project, then I advise you that FTA will still expect BART’s complete and timely cooperation in remediating Title VI non-compliance issues.

“Please let me know as soon as possible if you choose to pursue federal funding for the Project, which would trigger the requirement that BART timely submit a remedial action plan. We would also like to know if MTC and BART choose the alternative of reprogramming the ARRA funds to other Bay Area projects so we can execute those grants promptly.”

4 The letter stresses: “The [project] has been a local priority for more than a decade because it will provide a critical link in the intermodal transportation system of the San Francisco-Oakland Bay Area. That is why the MTC allocated $70 million in ARRA funds to the [project] and the MTC, the BART Board of Directors, the Oakland City Council and the Port of Oakland Board of Commissioners have consistently voted in support of the Project. All are comprised of or appointed by local elected officials who seek out and represent the interests of the residents and diverse communities of the region.” Noting job and economic benefits, the letter closes: “That is why the [project] has the strong support of the local business organizations, trade unions, and community and citizen groups for the Bay Area. [¶] I look forward to working with you and the FTA
In a demand letter of January 26, McKee wrote to the board that the response letter, by containing signatures of a majority of the board “outside a public meeting, represent[ed] an unagendized, secret ‘action taken’ (§ 54952.6) in violation of the Brown Act,” and demanded that the board **rescind the action taken . . . .** BART General Counsel Matthew Burrows wrote back on February 2, explaining that the letter simply reiterated a position taken by the board in publicly noticed meetings on at least two occasions, including the 2009 resolution authorizing staff to pursue federal funding, “and clearly does not constitute an ‘action’ as defined in the Brown Act.” McKee wrote back to Burrows the next day to say the matter was now one for litigation and that future communications should be directed to his attorney, Kelly A. Aviles (also his counsel on this appeal). He filed his petition on February 10.

Attempting to avoid the litigation by curing or correcting any arguable violation, the board formally “authorize[d]” the response to the Rogoff letter at its regular meeting on February 25, noticing the matter for the consent calendar as “Letter to Federal Transit Administration Administrator Rogoff (Alleged Brown Act Violation). Board requested to authorize” (footnote stating “Attachment available” omitted).

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5 General Counsel Burrows had explained to the board in a February 18 letter that McKee was intent on litigating despite their communications. He advised: “Generally, the Brown Act bars a lawsuit if the Board authorizes the complained of act in public session within 30 days of notice of a complaint. Although we believe that Mr. McKee’s complaint would ultimately be rejected, we also believe that District resources would be better spent on other important District business, instead of engaging in litigation.” A letter of February 23 from the general counsel to McKee’s counsel, Aviles, enclosed a copy of the agenda, advised that litigating the issue was not felt to be in the public’s or BART’s interest, and asked that the suit be dismissed in light of the correction, to occur within 30 days of the demand (see § 54960.1, subd. (c)).

Further correspondence produced no resolution. Aviles took the position that the curative action by the board was inadequate, and that McKee would want his legal fees before dismissing.
Meanwhile, on February 12, the FTC denied ARRA funding for the project. This was acknowledged at the ultimate hearing on the petition before the Honorable Frank Roesch, but McKee’s counsel, Aviles, while dropping her request to rescind the asserted action, insisted that relief was still needed because of BART’s ongoing position that there had been no Brown Act violation in the first place.

The court denied all relief. Remarks by Judge Roesch at the hearing reflected his reasoning that the letter did not change the board action previously taken, that no board action was legally required with respect to the Rogoff letter, and that the board had not appeared to reconsider its prior authorization. The court expressly found (1) no action taken, (2) a cure of any alleged violation, and (3) no proof that the alleged violation was a common occurrence so as to warrant injunction.

III. DISCUSSION

A. Review Standards

Review of a ruling on writ of mandate (Code Civ. Proc., § 1085) is ordinarily confined to an inquiry whether the findings and judgment of the trial court are supported by substantial evidence, but we make our own determination when the case involves resolution of questions of law where the facts are undisputed. (Californians Aware v. Joint Labor/Management Benefits Committee (2011) 200 Cal.App.4th 972, 978.) Review of a decision whether to grant an injunction is similar. We exercise our independent judgment in applying a statute to underlying facts that are not in dispute; but where the trial court had to resolve disputed factual issues, we review such findings for substantial evidence, lacking power to substitute our own deductions for those of the trial court. (Shapiro v. San Diego City Council (2002) 96 Cal.App.4th 904, 912.)

B. “Action taken”

“The purpose of the Brown Act is to facilitate public participation in local government decisions and to curb misuse of democratic process by secret legislation by public bodies. [Citation.] To these ends, the Brown Act imposes an ‘open meeting’ requirement on local legislative bodies. (§ 54953, subd. (a).)” (Boyle v. City of Redondo Beach (1999) 70 Cal.App.4th 1109, 1116 (Boyle).) The parties do not dispute that the
board is a legislative body for these purposes. A “‘meeting’ means any congregation of a majority of the members of a legislative body at the same time and location, . . . to hear, discuss, deliberate, or take action on any item that is within the subject matter jurisdiction of the legislative body” (§ 54952.2, subd. (a)), and a majority “shall not, outside a meeting authorized by this chapter, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business” within its jurisdiction (id., subd. (b)(1)).

Crucial to the case before us: “Section 54952.6 defines ‘“action taken”’ as ‘a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or a negative decision, or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance.’” (Boyle, supra, 70 Cal.App.4th at p. 1118.)

The facts of this case do not show any “action taken” within the definition just quoted, but McKee presents a series of arguments why we should nevertheless read the Brown Act as having been violated. We begin by accepting his argument that the serial-communications prohibition of section 54952.2, subdivision (b)(1), might apply in this case. We say might because we do not know precisely how the letter came to be signed by eight board members. Perhaps none of them had any discussion at all, just signed after reading the self-explanatory letter, and never spoke to one another. One reasonable inference is that the general manager, acting as an intermediary, circulated the letter serially to each member with some explanation that it was a response to Rogoff’s inquiry about continued pursuit of federal funding, perhaps passing along other members’ views or positions (§ 54952.2, subd. (b)(2)), but we have no declaration or other evidence on that point. It would seem that, faced with nothing but conflicting factual inferences, we are obligated to draw the inference most favorable to the trial court’s denial of relief. But even if McKee could prevail on this point, he would struggle to show there was any “action taken” within the meaning of section 54952.6. As the trial court observed,
sending the letter to Rogoff did not in any way change the action and intent of the board already expressed in open session in compliance with the Brown Act.

McKee argues that, because the statutory phrasing is that serial communications cannot be used “to discuss, deliberate, or take action on any item of business” (italics added) (§ 54952.2, subd. (b)(1)), a Brown Act violation does not require that action be taken. He overstates the matter. More accurately, while a Brown Act violation does not always require that a collective concurrence be reached, it still begs the question, What was the proposed “action taken”?

The issue, as he recognizes, emanates from Wolfe v. City of Fremont (2006) 144 Cal.App.4th 533 (Wolfe), which considered this language of former subdivision (b) of section 54952.2: “‘Except as authorized pursuant to Section 54953, any use of direct communication, personal intermediaries, or technological devices that is employed by a majority of the members of the legislative body to develop a collective concurrence as to action to be taken on an item by the members of the legislative body is prohibited.’” (Wolfe, supra, at p. 544, fn. 5.) A footnote added: “Accordingly, serial individual meetings that do not result in a ‘collective concurrence’ do not violate the Brown Act. . . .” (Wolfe, supra, at p. 545, fn. 6.) A statute later amending subdivision (b) of section 54952.2 to its present form stated: “(a) The Legislature hereby declares that it disapproves the court’s holding in [Wolfe] to the extent that it construes the prohibition against serial meetings . . . to require that a series of individual meetings by members of a body actually result in a collective concurrence to violate the prohibition rather than also including the process of developing a collective concurrence as a violation of the prohibition.” (Stats. 2008, ch. 63, § 1, No. 4 West’s Cal. Legis. Service, p. 198.)

The Legislature’s concern was that Wolfe would allow use of serial meetings to discuss and deliberate as long as no collective concurrence was reached, meaning that members might discuss everything about a proposed action short of polling for a concurrence, then convene in open session just for the poll and the action itself. To abrogate that view, the section now reads that serial communications cannot be used “to discuss, deliberate, or take action on any item of business” (italics added) (§ 54952.2,
subd. (b)(1)). But this does not help McKee here, where the problem is in identifying “action taken.” The former code language, after all, banned use of serial meetings “‘to develop a collective concurrence as to action to be taken on an item by the members of the legislative body . . . .’” (Italics added.) (Wolfe, supra, 144 Cal.App.4th at p. 544, fn. 5.)

Taking a different tack, McKee argues that there was a “new action” taken in the response to the Rogoff letter, for while it was signed by eight of the nine board members, the initial 2009 resolution authorizing the pursuit of federal funds passed by a vote of just seven to two, one vote less than in the letter. We reject that notion. Actions by legislative bodies are often divided but collective concurrences, and it is the result that must count as the action, not the particular breakdown of the vote. In McKee’s view, apparently, there would be new action not only upon any shift of a member’s view, but also when board membership changed. It is a meaningless distinction when the prime concern of the Brown Act is ensuring that legislative bodies’ “actions be taken openly and that their deliberations be conducted openly.” (§ 54950.) The particular breakdown of a vote on an action appears to be immaterial unless, of course, the concurrence shifts enough that the outcome is different.

We also distinguish, as the trial court did, the shared underlying facts of Common Cause v. Stirling (1981) 119 Cal.App.3d 658, and Common Cause v. Stirling (1983) 147 Cal.App.3d 518. Those decisions did not actually hold on appeal that a Brown Act had occurred but, in addressing issues of attorney fees, accepted a violation found by the trial court that was not disputed by the parties for appeal purposes. The facts resembled those here in that a majority of city council members had signed a letter directing action by the city manager concerning an eminent domain action previously authorized by the council. (Common Cause v. Stirling, supra, 119 Cal.App.3d at pp. 660-661.) The difference was that the letter halted the previously authorized action by directing the city manager not to serve a summons in the action and to abandon the action altogether. (Id. at p. 661.) Here by contrast, the letter to FTC Administrator Rogoff did not alter the board’s position in any way; it simply reaffirmed the board’s previously taken action.
We hold that the letter response by the signing board members did not constitute action taken, and thus did not violate the Brown Act. It did not change the previously and openly voted commitment of the board to pursue federal funding for the project, and no collective board action was required to respond to the Rogoff letter since the general manager, who also signed it, had the authority to issue the response on her own.

C. Declaratory and Injunctive Relief

Our conclusion above necessarily resolves issues about the trial court’s denial of declaratory and injunctive relief. There being no violation of the Brown Act, there was no abuse of discretion in declining to declare a violation or issue an injunction.

IV. DISPOSITION

The judgment is affirmed.

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Haerle, J.

We concur:

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Kline, P.J.

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Lambden, J.