NO. 104579-4

SUPREME COURT OF THE STATE OF WASHINGTON

BRADSHAW DEVELOPMENT, INC.
dba ANYTIME FITNESS,

Respondent,

v.

WASHINGTON STATE DEPARTMENT
OF LABOR AND INDUSTRIES,

Petitioner.

REVISED PETITION FOR REVIEW DEPARTMENT OF LABOR AND INDUSTRIES

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I. INTRODUCTION

A business cannot transact business with the public and then claim that its work activities are shielded by constitutional privacy provisions from workplace safety investigations. During the early COVID-19 pandemic, the Governor closed gyms as non-essential businesses. Bradshaw Development, Inc. kept its gym, Anytime Fitness, open, exposing its customers and employees to COVID-19. When Department of Labor and Industries (L&I) workplace safety inspectors arrived to investigate Anytime Fitness, they observed that the gym was open with a brightly lit "open" sign and a "Welcome back" sign. They observed customers in workout apparel, including one with a gym bag, entering the gym.

To gain consent to inspect without delay as authorized by the Washington Industrial Safety and Health Act (WISHA), the inspectors entered through the front door opened by a keycard used by a customer. RCW 49.17.070(3) authorizes inspectors to enter a workplace at a "reasonably recognizable entry point" to

gain consent to inspect. The Court of Appeals decided the entry point was an "unreasonable point of entry." But this interpretation removes "recognizable" from the statute. A front door to an open business is plainly a reasonably recognizable entry point. This Court should grant review so that the Court of Appeals' misinterpretation of the statutory language does not hamper WISHA inspections authorized by the Legislature to protect workers and the public.

The Court of Appeals also incorrectly ruled that the investigators' tailgating of a customer to enter the gym violated the Fourth Amendment and article I, section 7 of the Washington Constitution. This holding disregards the many cases holding there is no constitutional violation if a business exposes its activity to the public. Here Bradshaw Development openly exposed its activities to the public when customers could open the door and work out in the gym's common area.

Bradshaw Development cannot have it both ways. It cannot treat the gym as a public space when it suits its interests and then insist it is private when an inspector seeks to enter it.

L&I asks the Court to grant review.

II. IDENTITY OF PETITIONER AND DECISION

Petitioner L&I seeks review of the Court of Appeals' published decision in *Bradshaw Development, Inc. v. Department of Labor & Industries*, No. 40360-2-III (Wash. Ct. App. June 26, 2025). *See* App. 1-24. Petitioner also seeks review of the order granting in part L&I's motion for reconsideration and amending opinion on August 21, 2025. *See* App. 25-26.

III. ISSUES PRESENTED FOR REVIEW

1. Did L&I's inspectors enter Anytime Fitness through a reasonably recognizable entry point when they entered the front door of the gym, near a lit "open" sign, and observed customers entering through the front door?

2. When a business allows customers to use a keycard to enter a commercial gym and to work out in the gym, does entry by workplace safety inspectors following a customer using a keycard constitute an intrusion on private affairs under article I, section 7 or contravene a reasonable expectation of privacy under the Fourth Amendment?

IV. STATEMENT OF THE CASE

A. The Governor Directed That Gyms Were Non-Essential Businesses That Needed to Be Closed to Protect Workers and the Public

The events of this case occurred during the early months of the COVID-19 pandemic when the State was striving to save Washingtonians' lives. COVID-19 is "a novel, potentially deadly, severe acute respiratory illness caused by a virus that is most commonly transmitted person to person." *Slidewaters LLC v. Dep't of Lab. & Indus.*, 4 F.4th 747, 752 (9th Cir. 2021). It is a potentially fatal workplace hazard that L&I addressed very seriously. CP 1119-20. According to L&I's workplace safety assistant director, COVID-19 presented a greater chance

of exposure "than any other hazard that we regulated at this time." CP 1120, 1113.

In 2020, there were over 262,000 COVID-19 cases reported in Washington, with over 15,000 hospitalizations and almost 4,500 deaths. Dep't of Health, *COVID-19 Annual Report 2020* at 3 (May 31, 2023).[1] Case, hospitalization, and death rates were approximately 1.5 times higher in Eastern Washington than Western Washington. *Id.*

The Governor declared a State of Emergency to respond to the COVID-19 pandemic, closing many businesses. Starting in May 2020, the Governor implemented a phased-in approach to reopening facilities through the "Safe Start Washington" plan. CP 722-30. Its purpose was to "reduce[] the risk to Washington's most vulnerable populations and preserve[] capacity in our health care system." CP 723. The proclamation permitted businesses to reopen in phases. CP 728. Gyms were

[1] https://doh.wa.gov/sites/default/files/2023-05/421038-2020Covid19AnnualReport.pdf.

considered non-essential, so they could not operate during Phase 1, which was in effect during relevant time periods here. CP 728, 1126-27, 1189.

To protect workers, L&I adopted former emergency rule WAC 296-800-14035 (2020), which required employers to follow the Governor's proclamations about COVID-19. CP 630. The rule ensured that employees were not "placed in unsafe conditions by their employers." *Slidewaters*, 4 F.4th at 753.

B. Anytime Fitness Opened Despite the Governor's COVID-19 Proclamations

Bradshaw Development operates gyms under the name Anytime Fitness, including one in Selah in Yakima County. CP 1221-22. Its business model is to secure its entrance with a keycard reader that customers use. CP 28, 1195, 1259, 1293.

In response to a complaint that Anytime Fitness gyms were operating during Phase 1, L&I sent a cease-and-desist notice. CP 32, 1185, 1189. It ordered Bradshaw Development to cease operations to comply with the Governor's phased

approach. CP 1185. But Anytime Fitness stayed open for its customers. CP 32, 1185, 1222.

On June 15, 2020, at around 2:00 pm, two L&I inspectors went to the Selah Anytime Fitness location. CP 1102, 1185-86. They found there a lit neon sign saying the facility was "open." CP 1187. Through the window the inspectors saw a large sign that said, "Welcome back." CP 1201.

The inspectors attempted to enter the facility, but the door was locked, and no one answered the posted telephone number. CP 1194-95. The inspectors observed a customer in workout apparel with a gym bag entering the facility. CP 1187. To obtain consent to inspect, the inspectors entered the front door when it was opened by the customer. CP 1187, 1195. Immediately, the inspectors witnessed staff and customers in the gym. CP 1187-88. While seeking consent to inspect, the inspectors saw "three people sitting in an office, and then further into the gym area, where the workout equipment is, we saw approximately 10 people making use of that equipment."

CP 1187. In the office, there were two employees and a customer signing up for a new gym membership. CP 29, 1188.

The inspectors asked for consent to inspect, and the employee denied the request. CP 28, 1188. The employee instructed the inspectors to wait for the general manager. CP 29, 1188. While waiting, the inspectors saw "customers entering the facility to make use of the workout equipment." CP 1191.

When the general manager arrived, he denied the inspection request, saying what the inspectors were doing was a "joke." CP 1189-90.

C. L&I Cited Bradshaw Development for Violating Former WAC 296-800-14035 by Being Open, and the Board Affirmed

L&I cited Bradshaw Development for violating former WAC 296-800-14035. CP 1098. Bradshaw Development appealed to the Board. CP 23.

The Board found that the "open" sign and the observation of a person carrying a gym bag entering the gym left no doubt

the gym was "open for business," CP 28-29, 32, and that the inspectors properly entered the building following the gym member carrying the gym bag, CP 28.

The Board found the inspectors entered at a "reasonably recognizable entry point" and at the only "obvious" entry point:

> They did so in a safe manner and at a reasonably recognizable entry point. Yes, they entered the building by "tailgating" a member, but they used the only obvious entrance. And, in a facility with a unique business model like Anytime, this was the only feasible means of entering the building "without delay," as the statute provides.

CP 28. The Board emphasized that the inspectors "had the right to enter the building for the sole purpose of obtaining consent to inspect the premises." CP 28. The Board found that Bradshaw Development's activities took place in plain view, and so testimony about those activities was proper under RCW 49.17.070(4). CP 28.

Based on the plain-view observations the inspectors made during their time at the gym, the Board found that the individuals in the office, the employee that greeted the

inspectors, and the two people assisting the new member were employees that Bradshaw Development allowed to engage in work activities. CP 29, 32. The Board also found that there was members present. CP 29, 32.

The Board found that the employees were exposed to "unacceptable levels of the [c]oronavirus" on that date, CP 32.

D. The Superior Court and Court of Appeals Reversed the Board

Bradshaw Development appealed to the superior court. CP 1. The superior court upheld the Board's findings, including that the front door "was a reasonably recognizable entry point" under the circumstances, but ruled the evidence about what the inspectors saw wasn't admissible. CP 1293-94, 1305. The superior court also ruled that L&I needed a warrant to inspect the facility. CP 1293, 1304-05.

L&I appealed. CP 1295. Because Bradshaw Development lost before the Board, it needed to assign error to the Board's findings to contest them. *See Bayley Constr. v. Dep't of Lab. & Indus.*, 10 Wn. App. 2d 768, 782, 450 P.3d 647

(2019). The Court of Appeals concluded that because no error was assigned to the Board findings, that the findings were all verities. Order Granting in Part Mot. for Recons. 1-2 (Aug. 21, 2025). Thus, it is a verity that on June 15, 2020, Anytime Fitness was conducting business, that members were present, that the inspectors followed a member into the gym, and that the front door was a reasonably recognizable entry point. And it admitted that the inspectors followed a customer into the business who used keycard access to enter and that the gym was "accessible by customers with key cards." Appellant's Br. 6; *see* Appellant's Br. 5, 7, 9, 13, 16.[2]

The Court of Appeals ruled that "tailgating behind an entrant who opened an outside door with her keycard constituted an unreasonable point of entry and violated the fitness club owner's reasonable expectation of privacy." Slip op. 1.

[2] The Court of Appeals directed the parties to refer to Bradshaw Development as the appellant and L&I as the respondent.

V. ARGUMENT

Review should be granted for two reasons. First, curtailing L&I's ability to inspect workplaces harms workers, presenting an issue of substantial public interest. RAP 13.4(b)(4). Second, a ruling that a business has a privacy interest in areas where it allows public access raises significant questions of constitutional law and conflicts with numerous appellate decisions. RAP 13.4(1) - (3).

A. The Legislature Sought to Expedite Inspections to Protect Workers, Presenting an Issue of Substantial Public Interest

1. The gym's front door was a reasonably recognizable entry point

The Legislature authorizes L&I to enter worksites "without delay" to inspect them for workplace hazards. RCW 49.17.070(1)(a). The Legislature authorizes L&I to enter a workplace at a "reasonably recognizable entry point." RCW 49.17.070(3).

RCW 49.17.070(3) focuses on whether there is an entry point that is "reasonably recognizable." Thus, the Court of

Appeals erred in formulating the test as whether there was a "[]reasonable point of entry." Slip op. 1. Instead, "reasonably" modifies "recognizable."

Under RCW 49.17.070(3), the front door was a reasonably recognizable entry point. An entry point includes entry at a door. "Entry" means "the place or point at which entrance is made…DOOR, GATE." Entry, *Merriam-Webster Unabridged Dictionary*.[3] "Recognizable" means "capable of being recognized." Recognizable, *Merriam-Webster Unabridged Dictionary*.[4] "Recognize" means "to perceive clearly." Recognize, *Merriam-Webster Unabridged Dictionary*.[5]

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[3] https://unabridged.merriam-webster.com/unabridged/entry (last visited Sept. 10, 2025).

[4] https://unabridged.merriam-webster.com/unabridged/recognizable (last visited Sept. 10, 2025).

[5] https://unabridged.merriam-webster.com/unabridged/recognize (last visited Sept. 10, 2025).

The gym's front door was capable of being perceived clearly as an entry point. Indeed, the door was being used by customers to enter the gym. CP 28, 1187, 1191, 1195, 1201, 1305; Appellant's Br. 6-7, 9, 13, 16. Bradshaw Development secured the front door with keycard access that customers could use, showing that door was a reasonably recognizable access point. *See id.* The gym was open as shown by a lit neon open sign, a large sign viewable through the window that said, "Welcome back," and the adverse inference drawn from owner Wesley Bradshaw's refusal under the Fifth Amendment to answer whether the gym was open. CP 28-29, 32, 1187, 1201.

The Board acknowledged that "Yes, [the inspectors] entered the building by 'tailgating' a member," but did so in a safe manner using "the only obvious entrance." CP 28. That Bradshaw Development limited access to the door by locking it for non-customers does not change that it was a readily identifiable entry point. "[I]n a facility with a unique business model like Anytime, [the door] was the only feasible means of

entering the building 'without delay.'" CP 28. Thus, the Board correctly found that the front door was reasonably recognizable as an entry point.

2. Access to inspections is critically important to Washington employees' health and safety

The Court of Appeals' approach is counter to bedrock principles under WISHA and article II, section 35 of the Washington Constitution. WISHA and matters related to WISHA must be interpreted to benefit workers. *See* RCW 49.17.010 (WISHA ensures "insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington."). And the Washington Constitution mandates that the Legislature adopt workplace safety protections. Wash. Const. art. II, § 35; *Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.*, 196 Wn. 2d 506, 519-20, 475 P.3d 164 (2020) (worker safety is a fundamental right). The Legislature stresses the importance of inspections: "The legislature intends that inspections performed under the Washington industrial safety and health act ensure

safe and healthful working conditions for every person working in the state of Washington." Laws of 2006, ch. 31, § 1.

To that end, RCW 49.17.070(1)(a) authorizes L&I inspectors to enter jobsites "without delay." So to promote safety for over four million workers in Washington[6] through over 5,000 safety inspections a year,[7] the Legislature authorizes an expedited mechanism to obtain consent to inspect.

When there is a complaint about worker safety, L&I investigates quickly. Strong evidence shows that investigative interventions improve health outcomes. *See* Dep't of Lab. & Indus., *Effectiveness of Compliance Activities.*[8] Such interventions combated the deadly COVID-19 pandemic—"a

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[6] Wash. Emp. Sec. Div., *The Monthly Employment Report* 2 (May 2025), https://esd.wa.gov/media/pdf/2862/monthly-employment-report-may-2025pdf/download?inline.

[7] Occupational Health & Safety Admin., *FY 2024 FAME Report* (2024), available at https://www.osha.gov/stateplans/famereport/WA.

[8] https://www.lni.wa.gov/safety-health/safety-research/ongoing-projects/effectiveness-of-compliance-activities.

disaster unlike any the citizens of Washington have seen before." *Matter of Inslee*, 199 Wn.2d 416, 434, 508 P.3d 635 (2022).

B. Ignoring the Presence of Members of the Public When Finding a Privacy Interest Presents a Significant Constitutional Question and Conflicts with Decisions of the Supreme Court and the Court of Appeals

When members of the public could open the gym door and use the gym, no private affairs could be intruded upon. In ruling that that L&I violated Bradshaw Development's privacy interest, the Court of Appeals said, "we rely principally on the external door being locked." Slip op. 19. But Bradshaw Development knowingly engaged in business with its customers who were allowed keycard privileges. At this point, the activity at the gym entrance (opening the door) was openly exposed to the public, so there was no violation of either the Fourth Amendment or article I, section 7.

The result in this case is the same under the Fourth Amendment or article I, section 7 because Bradshaw Development knowingly engaged in business transactions with

the public, which is fatal to a privacy claim under both provisions. Many relevant decisions start with the oft-cited passage from *State v. Hastings*, which emphasized that "[b]usiness transactions with the public are not 'private affairs,'" 119 Wn.2d 229, 233, 830 P.2d 658 (1992). In *State v. Carter*, the Court cited this quote, holding that "any distinction between the state and federal provisions is of no consequence." 127 Wn.2d 836, 848, 904 P.2d 290 (1995).

1. Neither the Fourth Amendment nor article I, section 7 is violated if a business knowingly transacts business with the public

A "search" under the Fourth Amendment does not occur unless (1) there is a subjective manifestation of privacy in the area searched *and* (2) society recognizes that privacy interest as reasonable. *Kyllo v. United States*, 533 U.S. 27, 33, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001).

Under the Fourth Amendment, there is no Fourth Amendment protection for what one "knowingly exposes to the public." *Katz v. United States*, 389 U.S. 347, 351, 88 S. Ct. 507,

511, 19 L. Ed. 2d 576 (1967). "The fact that a transaction is conducted with the public has been enough for us to find that such transaction is not private." *State v. Clark*, 129 Wn.2d 211, 226, 916 P.2d 384 (1996) (a person has no expectation of privacy under the Fourth Amendment in a home where illegal business is conducted); *Dodge City Saloon, Inc. v. Liquor Control Bd.*, 168 Wn. App. 388, 398, 288 P.3d 343 (2012) (no privacy interest "in areas of [a business's] licensed premises that it actively invites the public to enter"). Bradshaw Development knowingly engaged in business with its customers who were allowed to use the gym with keycard privileges—exposing the business and its activities to the public, so there is no reasonable expectation of privacy under the Fourth Amendment.

In *See v. City of Seattle*, the U.S. Supreme Court held that it is regulatory inspections of portions of commercial premises that "are not open to the public" and so exclusively occupied by owners and their representatives that require a warrant. 387

U.S. 541, 545, 87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967). Thus, under the Fourth Amendment, "regulatory inspections of commercial premises held open to the public, as opposed to commercial premises or portions of such premises restricted to all but employees or owners, is not a search and does not require a warrant." *Dodge City*, 168 Wn. App. at 398 (citing *See*, 387 U.S. at 545). The gym's door, floor, and public office were not exclusively occupied by Bradshaw Development when the inspectors arrived because customers were present, so the company had no reasonable expectation of privacy.

The superior court found an expectation of privacy on a theory that a business that limits entry to keycard holders is not open to the public. CP 1293, 1305. But the keycards are not used exclusively by Bradshaw Development and its representatives as required in *See.* To the contrary, the company's customers use them as well, as was evident to the inspectors. CP 28, 1187, 1191, 1195, 1201, 1305; Appellant's Br. 6-7, 9, 13, 16.

To determine whether a violation of article I, section 7 has occurred, courts determine whether there is a disturbance in someone's private affairs. *State v. Evans*, ___ Wn.3d ___, 572 P.3d 1172, 1179 (2025). If there is no private affair being disturbed, the analysis ends and no violation has occurred. *State v. Puapuaga*, 164 Wn.2d 515, 522, 192 P.3d 360 (2008). Private affairs are determined, in part, by examining the historical treatment of the interest asserted. *Id.* If historical analysis does not show an interest is protected under article I, section 7, the Court considers whether the expectation of privacy is one that a citizen of this State is entitled to hold. *Id.*

Under article I, section 7, historical analysis establishes that "what is voluntarily exposed to the public" is not a private affair. *E.g.*, *State v. Carter*, 151 Wn.2d 118, 126, 85 P.3d 887 (2004); *Serv. Emps. Int'l Union Loc. 925 v. Freedom Found.*, 197 Wn. App. 203, 223, 389 P.3d 641 (2016) ("What a person voluntarily exposes to the general public is not considered part of a person's private affairs.") (citing *State v. Young*, 123

Wn.2d 173, 182, 867 P.2d 593 (1994)). This principle is grounded in the seminal case *State v. Seagull*, in which the Court recognized that there is no privacy interest in "that which is knowingly exposed to the public." 95 Wn.2d 898, 632 P.2d 44 (1981) (quoting *State v. Kaaheena*, 59 Haw. 23, 28-29, 575 P.2d 462 (1978)).

The historical exclusion of that which is knowingly exposed to the public from "private affairs" for purposes of article I, section 7 resolves this matter. Even if it did not, the Court looks at the expectation of privacy, considering (1) "the extent to which the information has been voluntarily exposed to the public" and (2) "the nature and extent" of the intrusion. *See Evans*, 572 P.3d at 1180. First, advertising the gym as open and allowing keycards to be used by customers shows that Bradshaw Development acted voluntarily to expose its activities to the public. Thus, the public can be a customer and get a key card.

Second, private affairs are those that "reveal intimate or discrete details of a person's life." *Serv. Emps.*, 197 Wn. App. at 222 (citing *State v. Jorden*, 160 Wn.2d 121, 126, 156 P.3d 893 (2007)). In *Carter*, a defendant was in a hotel room selling controlled substances, and the Court held that the business transaction of selling controlled substances does not "come under the plain meaning of 'private affairs.'" 127 Wn.2d at 848. Likewise, the sale of workout time in a gym operating illegally is not a private affair.

The nature and extent of the information gathered here was the viewing of business activities like customers using exercise equipment, which did not reveal any "intimate or discrete details of a person's life," *Serv. Emps.*, 197 Wn. App. at 222, or "sensitive personal information" as required by article I, section 7. *State v. Brelvis Consulting LLC*, 7 Wn. App. 2d 207, 229, 436 P.3d 819 (2018).

As the investigators gathered only visuals of customers working out and employees helping customers, no sensitive information was exposed or gathered.

2. A business need only transact business in the open with members of the public to abandon any privacy claim

The Court of Appeals suggests that the business needed to be "fully open" to the public for the privacy interest to be abandoned. *See* Slip op. 21. Four cases show that it is transacting business with the public that is relevant, not the percentage of the public involved.

Hastings affirmed that "a commercial center to which outsiders are invited for [unlawful] business" has no privacy interest. 119 Wn.2d at 232 (quoting *Lewis v. United States,* 385 U.S. 206, 211, 87 S. Ct. 424, 427, 17 L. Ed. 2d 312 (1966)). In *Hastings*, a drug dealer was selling drugs to customers in a residence. 119 Wn.2d at 231. Acting like customers, undercover police officers entered the residence and witnessed members of the public lined up to buy drugs. *Id.* The Court held

that the drug dealer's private affairs were in no way implicated. *Id.* at 233. "Business transactions with the public are not 'private affairs.'" *Id.*

The holding in *Hastings* did not depend on the business being fully open to the public; rather, the Court's focus was on the presence of "[b]usiness transactions with the public." *Hastings*, 119 Wn.2d at 233. And the *Hastings* residence was not "fully open" to the public; it was open only to those "invited for the purposes of transacting unlawful business." *Id.* at 232. *Hastings* thus establishes that a business need not be "fully open" to the public to defeat a privacy interest; inviting outsiders to transact business is enough.

In *Carter*, the defendant placed an illegally modified gun on a table in a class, viewable by other members of the class but not the public at large. 151 Wn.2d at 121, 126. The Court held there was no article I, section 7 violation because the gun was made public in the class. *Id.* at 126-27. The gun wasn't revealed to the public at large, only a subset—the class. *Id*. at 126.

State v. Lakotiy held that under article I, section 7, there is no privacy interest in activities taking place in a common area. 151 Wn. App. 699, 708-09, 214 P.3d 181 (2009). There the police received a call about suspicious activity at a storage facility that had a locked gate with a keypad. *Id*. at 704. The police were able to gain access after an unknown individual arrived and opened the gate with an access code. *Id.* Because the suspicious activity took place in the common area of the facility, the court found no privacy interest. *Id.* at 713. Only those who achieved keycard access to the storage facility could use the common area, so the facility was not "fully open."

And in *Peters v. Vinatieri*, 102 Wn. App. 641, 651-52, 9 P.3d 909 (2000), an RV park owner posted a no trespassing sign. But he also posted a sign advertising the RV park. *Peters*, 102 Wn. App. at 652. He contended that an access road was private because he posted a sign reading "for RV customers only." *Id.* The court rejected this distinction, explaining that the "RV customers are members of the public who are invited onto

Peters' property." *Id.* Thus, the court found no Fourth Amendment privacy interest, and held that investigators could enter, even though only RV customers were invited on the property. *Id.* at 651-52, 654. Thus, even where a business is open only to a subset of the public (such as RV customers, a drug dealer's invited customers, or a gym's customers) no private interest exists when at least some members of the public witness its business activities.

Here the Court of Appeals was concerned with the investigators' tailgating. Slip op. 1, 21. But because it was a *customer* that the investigators followed inside, there could be no intrusion on private affairs of the corporation. In *Hastings*, the police used a ruse to gain access to the residence where the defendant was selling drugs to customers. 119 Wn.2d at 231, 233. The method of entry did not matter given that members of the public were present. *Id.* at 233. It was the business activities that were relevant to the Court, not the method of entry. *Id.* Tailgating is no different than a ruse to gain entry.

Consistent with *Lakotiy*, most federal cases find no illegal search where government agents enter a common area by tailgating. *See* 151 Wn. App. at 713. These courts find that tailgating into a common area (where outsiders can view activity) does not invade a private interest. *See State v. Eisler*, 567 F.2d 814, 816 (8th Cir. 1977) (agent gained entry to an apartment common area by tailgating a tenant who had opened the door); *United States v. Barrios-Moriera*, 872 F.2d 12, 13-14 (2d Cir. 1989) (agent followed a suspect into an apartment common area when he knew the door "would automatically lock when it closed, [c]atching the door just in time"), *abrogated on other grounds by Horton v. California*, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990); *see also United States v. Correa*, 653 F.3d 187, 188-91 (3d Cir. 2011); *United States v. Boden*, 854 F.2d 983, 985, 990 (7th Cir. 1988); *Azam v. City of Columbia Heights*, 865 F.3d 980, 984, 990 (8th Cir. 2017); *United States v. Nohara*, 3 F.3d 1239, 1241-42 (9th Cir. 1993); *United States v. Maestas*, 639 F.3d 1032, 1038-39 (10th

Cir. 2011); *United States v. Miravalles*, 280 F.3d 1328, 1333 (11th Cir. 2002). Only the Sixth Circuit has the minority view. *See United States v. Carriger*, 541 F.2d 545, 551 (6th Cir. 1976). Even the Sixth Circuit has described its cases as "outside the mainstream." *United States v. Dillard*, 438 F.3d 675, 683 (6th Cir. 2006).

Lakotiy appropriately adopted the majority federal view about common areas for article I, section 7. 151 Wn. App. at 713. This approach should be followed here.

As federal courts have noted, having a locked door shows an interest in security, not privacy. *See Eisler*, 567 F.2d at 816; CP 1259. After all, the customers saw each other working out and were free to report what they observed to anyone they chose.

Finally, the Court of Appeals mentioned trespassing in passing, but no trespass occurred here. *See* Slip op. 21. Government agents may enter properties if statutorily authorized, and RCW 49.17.070 expressly authorized the

investigators' entry into Bradshaw Development's facility. *See Peters*, 102 Wn. App. at 655 (citing *Restatement (Second) of Torts* § 211 (1965)). And trespass is only relevant if there is an intrusion in "a constitutionally protected area." *See State v. Bowman*, 198 Wn.2d 609, 625, 498 P.3d 478 (2021) (quoting *Florida v. Jardines*, 569 U.S. 1, 5, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013)). Here there was no constitutionally protected area because there were members of the public present.

3. The Court of Appeals' decision will allow openly advertised wrongdoing

Bradshaw Development embraced the public nature of its gym to attract customers and gain revenue. (It was even signing up a new customer when the investigators appeared. CP 1188.). It cannot now insist that the gym is a private space to stop safety inspectors from doing their jobs. Review of the Court of Appeals decision is warranted because it allowed Bradshaw Development to reap all the benefits of being a public business while also allowing it to claim a privacy interest to evade compliance with the law.

The Court of Appeals' findings support affirming the Board: "Our resolution of this appeal does not come easy. Sound arguments support DLI's position that its inspectors possessed authorization to enter the locked door by tailgating." Slip op. 20. This acknowledgement supports this Court's review. And, as the Court of Appeals recognized, this case arose in the context of a deadly disease, and that Bradshaw Development "proudly flaunted" the laws enacted to prevent the spread. Slip op. 21.

VI. CONCLUSION

L&I asks this Court to grant review.

This document contains 4,992 words, excluding the parts of the document exempted from the word count by RAP 18.17.

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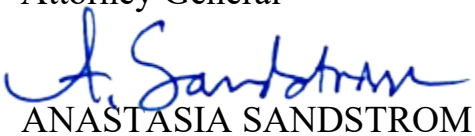
RESPECTFULLY SUBMITTED this 15th day of September, 2025.

NICHOLAS W. BROWN
Attorney General



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Appendix

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In the Office of the Clerk of Court
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

BRADSHAW DEVELOPMENT, INC. d/b/a ANYTIME FITNESS, Appellant, v. WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	)	No. 40360-2-III PUBLISHED OPINION

FEARING, J. — This appeal asks us to decide whether Department of Labor and Industries (DLI) inspectors possessed authority to tailgate a fitness club member through an otherwise locked door into the fitness club to ask for permission to inspect the business premises for employees working during the COVID-19 pandemic when the business should have been closed. In answering this question, we interpret RCW 49.17.070, which authorizes inspectors to enter commercial premises at "a reasonably recognizable entry point." We also apply Fourth Amendment principles. We conclude that tailgating behind an entrant who opened an outside door with her keycard constituted an unreasonable point of entry and violated the fitness club owner's reasonable expectation of privacy. Thus, we affirm the superior court's dismissal of a citation against Bradshaw Development, Inc. for

violating Proclamation by Governor Jay Inslee, No. 20-25.4 (Wash. May 31, 2020), https://governor.wa.gov/sites/default/files/2023-01/20-25.4%20-%20COVID-19%20Safe%20Start.pdf [https://perma.cc/4HY6-S2CM] and WAC 296-800-14035.

FACTS

This appeal concerns the alleged violation by Bradshaw Development, Inc., owner of Anytime Fitness, a fitness club, of WAC 296-800-14035(1), an interim DLI regulation precluding employees of a nonessential business from laboring during Phase 1 of Washington State's pandemic business reopening order. In response to the COVID-19 pandemic, Washington State Governor Jay Inslee issued Emergency Proclamation 20-25.4, effective May 31, 2020, which imposed a plan to reopen businesses in four phases. Under Phase 1, the most restrictive of the four phases, only the following businesses could reopen:

- Essential businesses open
- Existing construction that meets agreed upon criteria
- Landscaping
- Auto/RV/Boat/ORV sales
- Retail (curb-side pick-up orders only)
- Car washes
- Pet walkers

Clerk's Papers (CP) at 728. Phase 1 required temporary closure of nonessential businesses, including fitness centers. To implement Emergency Proclamation 20-25.4, DLI issued WAC 296-800-14035(1) that declared: when "a business activity is prohibited

by an emergency proclamation an employer shall not allow employees to perform work." CP at 5.

According to Anne Foote Soiza, DLI's Assistant Director in charge of the Division of Occupational Safety and Health, when DLI received a complaint about an operating nonessential business during Phase 1, the department first wrote a letter to the business to inform it about the extent to which it may be open, if at all. After sending the letter, DLI contacted the business by letter or phone to determine whether the business followed the restrictions mentioned in the educational letter. A DLI Compliance Safety and Health Officer, which we label an inspector, might then inspect the business. DLI issued a cease and desist letter if the business remained open.

Wesley Bradshaw owns Bradshaw Development, Inc. In 2020, Bradshaw Development operated four fitness centers in Yakima County under the name Anytime Fitness. During Phase 1 of Emergency Proclamation 20-25.4, DLI received a complaint that Anytime Fitness facilities remained open. DLI sent Bradshaw a cease and desist letter ordering, under Emergency Proclamation 20-25.4 and WAC 296-800-14035, that operations cease. Bradshaw ignored the letter. Anytime Fitness centers remained open for its members.

This appeal concerns only one of the four Anytime Fitness facilities, the Selah center. During the morning of June 15, 2020, DLI inspectors Stacia Johnson and Steve

Yunker traveled to the Selah facility. Upon their arrival, Yunker and Johnson observed a lit, neon "Open" sign on the facility's building. CP at 6, 1187, 1487. Johnson called the phone number listed on the front door of the facility but no one answered. The two inspectors watched an individual adorned in gym clothing and carrying a gym bag employ a keycard to unlock the front door of the gym. Yunker grabbed the door before it closed. The duo followed the individual through the open door.

Inside the fitness center, Steve Yunker and Stacia Johnson observed three individuals sitting in an office and ten individuals using gym equipment. According to Johnson, two of the three individuals in the office worked for Anytime Fitness and the third individual "appeared to be a customer signing up for a new gym membership." CP at 1188. Yunker and Johnson displayed their DLI badges to one of the employees and requested consent to search the premises. The worker denied consent, but invited Yunker and Johnson to wait while he or she called general manager, Jeff Mercer. Mercer arrived twenty minutes later. While the DLI inspectors waited inside the gym for Mercer's arrival, they observed people entering the building. The two saw a chalkboard sign near the entrance of the building bearing the inscription "Welcome back." CP at 6, 32, at 1189.

When Jeff Mercer arrived, Steve Yunker and Stacia Johnson presented their credentials and informed him of the purpose of their visit. They requested consent to

search the premises, which consent Mercer denied while asserting that the space was "private property." CP at 1189. Yunker suggested they continue the conversation outside in the parking lot, on "public property." CP at 1189, 1487. While outside, Mercer labeled the emergency proclamation a "joke." He insisted that Anytime Fitness would not close and that the inspectors violated the constitution. CP at 6, 1190. While outside of the gym, Johnson saw the "Welcome back" sign through a window and watched more individuals enter the gym. CP at 1201-02.

On June 25, 2020, DLI issued a citation, under WAC 296-800-14035, against Bradshaw Development, Inc. for the June 15 operation of Anytime Fitness in Selah. DLI also issued citations against Bradshaw Development for three other violations at different locations and on different dates.

PROCEDURE

Bradshaw Development, Inc. challenged the citations. During this challenge, Bradshaw Development asserted that none of its employees performed work activities at the locations at issue during the times in question.

During an administrative hearing, DLI inspector Stacia Johnson averred during cross-examination:

> Q. When you accessed the premises prior to the inspection, you said you went in the door.

> Did you follow in through a door that was opened by someone who accessed that door with a key?
>
> A. Yes.
>
> Q. So you didn't have permission to enter that establishment; correct?
>
> A. No. Not at that time.
>
> . . . .
>
> Q. Were you waiting at the front door until that door was opened by someone with a key pad?
>
> A. We were at the front door. We were at the front door calling the phone number that was listed on the front door, waiting for somebody to answer the phone.
>
> Q. Then you saw someone walk up to the front door and bring out a key card and access the building; correct?
>
> A. Yes.
>
> Q. When they opened the door, that's when you went in?
>
> A. At that time, my supervisor, Steve Yunker, went and said—went and grabbed the door and followed her in. So I followed.
>
> Q. Without permission; correct?
>
> A. Yes.
>
> Q. You didn't have a key card to access that facility; correct?
>
> A. No.
>
> . . . .
>
> Q. So when you were inside Anytime Fitness, you were not in the course of your inspection; is that correct?
>
> A. We had not opened the inspection, but we are able to observe.

CP at 1194-96.

An industrial appeals administrative law judge (ALJ) determined that DLI failed to establish that employees of Anytime Fitness worked at any of the four facilities on the identified dates. The ALJ vacated all four citations. DLI appealed to the Board of Industrial Appeals (Board). DLI argued that the combined observations of Steve Yunker

and Stacia Johnson, with reasonable inferences drawn from the evidence, proved that Anytime Fitness committed the violations because of the presence of an employee in each facility.

The Board agreed with the ALJ that DLI failed to present sufficient evidence to establish that employees at Anytime Fitness locations other than Selah worked on the stated dates. The Board, however, concluded that DLI presented sufficient evidence, through Stacia Johnson's testimony, to establish that employees at the Selah location worked on June 15 in violation of Emergency Proclamation 20-25.4 and WAC 296-800-14035. The Board affirmed the one citation, reasoning:

> The lit "open" neon sign in the window of the Selah Anytime facility and Ms. Johnson's observation of a person who was carrying a gym bag enter the facility left no doubt that the fitness center was open for business. She and Mr. Yunker had the right to enter the building for the sole purposes of obtaining consent to inspect the premises. They did so in a safe manner and at a reasonably recognizable entry point. Yes, they entered the building by "tailgating" a member, but they used the only obvious entrance. And, in a facility with a unique business model like Anytime, this was the only feasible means of entering the building "without delay," as the statute provides.
>
> Mr. Yunker and Ms. Johnson did not conduct an inspection while they awaited Mr. Mercer's arrival. Because she had the right to be where she was while she waited for the general manager, Ms. Johnson's plain view observations were admissible. RCW 49.17.070(4) recognizes that these observations are exceptions to any warrant requirement and obviously does not require consent of the owner. Other than Mr. Mercer, who was not at the fitness center when Ms. Johnson arrived, none of the people she saw at the Selah facility identified themselves either by name or as employees. The Department presented only circumstantial evidence that

those people were Anytime employees and that they were performing work activities. By application of experience and reason, a fact finder may infer the existence of a specific fact based on circumstantial evidence. Credible circumstantial evidence is entitled to the same weight as direct evidence.

The circumstantial evidence about which Ms. Johnson testified supported the notion that the people whom she observed on June 15, 2020, were, in fact, Anytime employees who were performing work activities at the business.

> 1. The lit neon "open" sign in the window and the "welcome back" message on the chalkboard strongly indicated that the facility was open for business as usual.
>
> 2. The person from whom Ms. Johnson initially requested consent to conduct an inspection denied that he had the authority to do so but he told Ms. Johnson to wait until he could contact the general manager. He apparently did so—Mr. Mercer arrived within 20 minutes. It is unlikely that a person who was only a member would have assumed that he had authority to ask Ms. Johnson to wait for the general manager or that he would have known how to contact Mr. Mercer and that he would have done so.
>
> 3. It is probable that the three people Ms. Johnson observed in the office were Anytime employees. The office of a business is an area that common sense and experience indicate is reserved for employees.
>
> 4. The activities of the two people Ms. Johnson concluded were assisting a person enroll as a new member were consistent with those of employees, not members. It is highly unlikely that Mr. Bradshaw would have authorized a non-employee to accept a new member.

The inferences that we derive from Mr. Bradshaw's refusal to answer questions, in combination with the circumstantial evidence the Department presented by way of Ms. Johnson's observations, produced a simple preponderance of the persuasive evidence that Anytime committed a willful general violation of WAC 296-800-45035(1) on June 15, 2020, because it had employees who were performing work activities.

We affirm Citation and Notice No. 317959774.

CP at 28-29.

The Board entered, in part, the following findings of fact:

> 5. On June 15, 2020, Compliance Safety and Health Officers (CSHOs) employed by the Department of Labor and Industries visited Anytime's Selah, Yakima County location, to see if the business was in compliance with the governor's proclamation. On arrival, they saw a lit neon "open" sign in the window of the building but the doors opened only to individuals who had key cards. No one answered the telephone call they made to the business. For the sole purpose of obtaining consent to conduct an inspection, the CSHOs followed into the facility a woman who was carrying a gym bag and opened the front door. Approximately ten people were using the exercise equipment, three individuals were sitting in an office, and two people were assisting a new member enroll in the fitness center. The CSHOs presented their badges to one of the individuals and asked for permission to open an inspection. That person denied consent but asked the inspectors to wait where they were for the general manager to arrive. As they waited, the CHSO; observed several people enter the building as well as a chalkboard on which was written, "Welcome back." When the general manager arrived 20 minutes later, he refused to give consent for an inspection and the CSHOs left.
>
> 6. On June 15, 2020, the three people who were assisting the new member were Anytime employees whom Mr. Bradshaw allowed to engage in work activities.
>
> . . . .
>
> 8. Mr. Bradshaw allowed his employees to engage in work activities on June 15, 2020, in willful disregard of the governor's emergency proclamation because he had received the Department's educational and cease and desist letters, but he continued to operate the Selah Anytime facility in plain indifference to WAC 296-800-14035(1).

CP at 32.

Bradshaw Development appealed, to the superior court, the Board's decision that affirmed the June 15 citation for the Selah facility. The superior court reversed. The superior court entered the relevant conclusions:

> 1. Protection against unreasonable searches and seizures extends to commercial property if there is a reasonable expectation of privacy. An expectation of privacy in commercial premises is different, and less significant, than a similar expectation in an individual's home. No search warrant is necessary for areas that are open to the public. But a warrant may be necessary to inspect the portions of commercial premises that are not open to the public. A business that limits entry to keycard holders is not open to the public. Therefore, Anytime Fitness had a reasonable expectation of privacy in the commercial premises. State and federal constitutions require a warrant to inspect the area inside the keycard accessible doors.
>
> 2. DLI inspectors have a statutory right of entry to a worksite. They may enter a business without notice through a reasonably recognizable entry point. The Inspectors' phone calls to the published phone number went unanswered. They were unable to obtain a designation for point of entry or consent for an inspection. Tailgating on a gym member's keycard was a reasonably recognizable entry point under the circumstances. However, the statute [RCW 49.17.070(3)] limits the Inspectors' entry to the sole purpose of requesting consent for an inspection. Because the statute that allows entry without consent limits the purpose for the entry, the plain view doctrine did not apply. The Inspectors' purpose for gaining entry to a private space was limited by the statute to the sole purpose of obtaining consent.
>
> 3. The Administrative Procedures Act requires a presiding officer in an adjudicatory hearing to exclude evidence that is excludable on constitutional or statutory grounds. The evidence of what the inspectors saw while waiting to obtain consent for the inspection must be excluded.
>
> 4. Excluding evidence of employees at the worksite requires the remaining citation to be dismissed for lack of evidence.

CP at 1293-94.

On May 20, 2024, the superior court entered a judgment that reversed the one citation upheld by the Board. The judgment reads in part:

> . . . .
> 4. An owner of a business has an expectation of privacy in commercial property which society is prepared to consider reasonable, *Dodge City Saloon, Inc. v. Washington State Liquor Control Board.*, 168 Wn. App. 388, 398, 288 P.3d 343, 347 (2012). It is well settled law in Washington that regulatory inspections of commercial premises that are not held open to the public require either consent or a search warrant. Conversely, inspecting areas held open to the public, as opposed to commercial premises or portions of such premises restricted to all but employees or owners, is not a search and does not require a warrant. *Dodge City Saloon, Inc*, 168 Wn. App. at 398.
> 5. At the time of the inspection, Anytime Fitness was not open to the public but it was open to members. The record established that entry to the building was restricted to authorized persons with keycard access and that the gym was being utilized. This court has previously found the inspectors' tailgating behind an authorized user was a reasonable point of entry for purposes of obtaining the owner's consent.

CP at 1304-05.

LAW AND ANALYSIS

DLI appeals the superior court ruling dismissing the citation issued against the Selah Anytime Fitness facility. In response, Bradshaw Development contends DLI inspectors lacked authority to enter the locked door of the Selah Anytime Fitness facility. Thus, according to Bradshaw Development, DLI inspectors violated the law when tailgating the gym member into the facility. Because of its being locked, the door did not qualify as a reasonably recognizable entry point under RCW 49.17.070(3). In turn, in

conformance with the superior court's ruling, the law precluded DLI from relying on any observations of the inspectors while inside. Bradshaw Development assigns no error to the Board's findings of fact.

DLI responds that DLI inspectors entered the Selah facility door through a reasonably recognized point of entry as understood by RCW 49.17.070. DLI emphasizes that the door entered was the facility's front door. Thus, according to DLI, its inspectors possessed lawful authority to enter the door even if they tailgated. Although RCW 49.17.070(3) may have limited the inspectors to asking for consent to inspect once inside, the statute also permits the inspectors to later testify to their observations during the course of asking for and waiting for consent. DLI insists that the plain view or open view doctrine shields the inspector's testimony because of the language of RCW 49.17.070(4). DLI does not argue that its inspectors possessed authority to enter the facility regardless of the application of RCW 49.17.070(3). DLI does not argue that evidence gathered by its inspectors outside the Selah facility suffices to prove the regulation violation.

In reply, Bradshaw Development insists that, even if the law permitted the inspectors to testify to observations inside the Selah facility, DLI failed to present any evidence at the ALJ hearing that an employee then worked inside the premises. To show a violation, DLI needed to establish by a preponderance of evidence the presence of an employee currently working. Bradshaw Development emphasizes that, because of the

nature of a 24/7 fitness center, the facility may be open without any employee being present. We do not address Bradshaw Development's alternate argument because we rule that DLI inspectors lacked authority, under RCW 49.17.070(3), to enter the locked premises. When concluding the inspectors lacked authority, however, we rely on the unique nature of a 24/7 fitness club.

Under the Administrative Procedures Act (APA), chapter 34.05 RCW, we sit in the same position as the superior court when reviewing an agency action. *Tapper v. State Employment Security Department*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). We review the record before the reviewing administrative agency, the Board of Industrial Insurance Appeals, not the record before the superior court. *Inland Empire Distribution Systems, Inc. v. Utilities & Transportation Commission*, 112 Wn.2d 278, 282, 770 P.2d 624 (1989). Because Bradshaw Development does not challenge the Board's findings of fact, they are verities. *Dodge City Saloon, Inc. v. Washington State Liquor Control Board*, 168 Wn. App. 388, 395, 288 P.3d 343 (2012).

The focal question on appeal is whether DLI agents held authority, under RCW 49.17.070(3), to enter the Anytime Fitness Selah facility by tailgating behind a club member despite the entry door being locked to the public. RCW 49.17.070 governs DLI agents' entry into business premises to investigate purported violations of regulations. The statute reads in relevant portion:

> Right of entry—Inspections and investigations—Subpoenas—Contempt.
>
> (1) Subject to subsections (2) through (5) of this section, the director, or his or her authorized representative, in carrying out his or her duties under this chapter, upon the presentation of appropriate credentials to the owner, manager, operator, or on site person in charge of the worksite, is authorized:
>
> (a) *To enter without delay* and at all reasonable times the factory, plant, establishment, construction site, or other area, workplace, or environment where work is performed by an employee of an employer; and
>
> (b) To inspect, survey, and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such workplace and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent, or employee.
>
> . . . .
>
> (3) Except as provided in subsection (4) of this section or RCW 49.17.075, the director or his or her authorized representative shall obtain consent from the owner, manager, operator, or his or her on-site person in charge of the worksite when entering any worksite located on private property to carry out his or her duties under this chapter. *Solely for the purpose of requesting the consent required by this section, the director or his or her authorized representative shall, in a safe manner, enter a worksite at an entry point designated by the employer or, in the event no entry point has been designated, at a reasonably recognizable entry point.*
>
> (4) This section does not prohibit the director or his or her authorized representative from *taking action consistent with a recognized exception to the warrant requirements* of the federal and state Constitutions.
>
> (5) This section does not require advance notice of an inspection.

(Emphasis added.) One should read RCW 49.17.070 with RCW 49.17.075, which authorizes a search warrant. The latter statute reads:

> The director may apply to a court of competent jurisdiction for a search warrant authorizing access to any factory, plant, establishment, construction site, or other area, workplace, or environment where work is performed by an employee of an employer. The court may upon such application issue a search warrant for the purpose requested.

At the time of the adoption of RCW 49.17.070, the legislature declared:

> The legislature also intends that the inspections comply with the fourth and fourteenth amendments to the United States Constitution and Article I, section 7 of the state Constitution.

LAWS OF 2006, ch. 31, § 1. RCW 49.17.070(3)'s demand that the DLI inspectors gain consent to search further confirms the desire by the state legislature that the search be performed pursuant to reasonable search and seizure restrictions.

We must decide whether the door entered by Stacia Johnson and Steve Yunker qualified as "a reasonably recognized entry point" under RCW 49.17.070(3). The statute does not define any of these words. No case law aids in circumscribing the unique term. Because the employer designates the other entry point mentioned in the statute, we gauge a reasonably recognized entry point from the viewpoint of a member of the public, not the viewpoint of the employer.

DLI does not expressly argue that commercial premises, in which employees toil, must maintain a reasonably recognizable entry point. We would reject such an interpretation anyway. RCW 49.17.070(3) references "*a* reasonably recognizable entry point" rather than "*the* reasonably recognizable entry point." We emphasize the use of

the indefinite article "a." The articles in a statutory text—the definite articles and the indefinite articles—should not be overlooked or discounted, but should be treated as being chosen by design and as intending a particularized effect. *Guardado v. Guardado*, 200 Wn. App. 237, 243, 402 P.3d 357 (2017); *In re A.P.*, 245 W.Va. 248, 254, 858 S.E. 2d 873 (2021). If the statute employed the definite article "the," we would conclude that Anytime Fitness needed to maintain a reasonably recognizable entry point. But the indefinite article "a" implies that the business premises need not have any such entry point.

Because the state legislature wanted RCW 49.17.070(3) to be interpreted in compliance with constitutional principles, we rely heavily on constitutional law when deciding that entering a locked door by tailgating does not qualify as entering a reasonably recognizable entry point. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article 1, section 7 of the Washington Constitution provides:

> No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

The protections of article I, section 7 of the Washington Constitution extend to administrative searches coextensively with those of the Fourth Amendment. *Seymour v. Washington State Department of Health, Dental Quality Assurance Commission*, 152 Wn. App. 156, 165, 216 P.3d 1039 (2009); *Centimark Corp. v. Department of Labor & Industries*, 129 Wn. App. 368, 375, 119 P.3d 865 (2005).

In the constitutional setting, the right to privacy applies to areas with a reasonable expectation of privacy combined with a subjective manifestation of privacy in the place searched. *Kyllo v. United States,* 533 U.S. 27, 33, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001); *Centimark Corp. v. Department of Labor & Industries of Washington*, 129 Wn. App. 368, 374 (2005). Protection against unreasonable searches and seizures extends to commercial property. *Seymour v. Washington State Department of Health, Dental Quality Assurance Commission*, 152 Wn. App. 156, 164 (2009); *Centimark Corp. v. Department of Labor & Industries of Washington*, 129 Wn. App. 368, 377 (2005). The United States Supreme Court has explicitly recognized that an owner or operator of a business has an expectation of privacy in commercial property, which society considers reasonable. *New York v. Burger*, 482 U.S. 691, 699, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987). The business owner, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. *See v. City of Seattle*, 387 U.S. 541, 543, 87 S. Ct. 1737, 18 L. Ed. 2d 943

(1967). The business owner, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by warrant. *See v. City of Seattle*, 387 U.S. 541, 543, 87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967).

Fourth Amendment protection covers administrative inspections designed to enforce regulations. *New York v. Burger*, 482 U.S. 691, 699, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987); *Centimark Corp. v. Department of Labor & Industries of Washington*, 129 Wn. App. 368, 377 (2005). Inspections for health, safety, and other violations of codes must be conducted pursuant to a warrant or fall within one of the narrowly drawn exceptions to the warrant requirement. *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 534, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967); *Thurston County Rental Owners Association v. Thurston County*, 85 Wn. App. 171, 183, 931 P.2d 208 (1997).

A government inspection of commercial premises normally requires a warrant. *Centimark Corp. v. Department of Labor & Industries of Washington*, 129 Wn. App. 368, 377 (2005). But that protection, just like protection for other buildings, must come from a reasonable expectation of privacy. *Centimark Corp. v. Department of Labor & Industries of Washington*, 129 Wn. App. 368, 377 (2005). An expectation of privacy in commercial premises holds less significance than a similar expectation in an individual's home. *Centimark Corp. v. Department of Labor & Industries of Washington*, 129 Wn.

App. 368, 377 (2005). A warrantless entry into a business is unreasonable only if the business is closed or the search extended into non-public areas. *New York v. Burger*, 482 U.S. 691, 699 (1987); *See v. City of Seattle*, 387 U.S. 541, 545 (1967). Regulatory inspections of commercial premises held open to the public, as opposed to commercial premises or portions of such premises restricted to all but employees or owners, is not a search and does not require a warrant. *See v. City of Seattle*, 387 U.S. 541, 545 (1967).

In ruling that Bradshaw Development, Inc. maintained a reasonable expectancy of privacy inside the Selah facility, we rely principally on the external door being locked. A locked door to an internal space may demonstrate objectively reasonable expectations of privacy and security therein. *People v. Garcia*, 62 Cal. 4th 1116, 1129, 365 P.3d 928, 936, 199 Cal. Rptr. 3d 164 (2016). A locked door is a very strong manifestation of a person's expectation of privacy. *People v. Trull*, 64 Ill. App. 3d 385, 389, 380 N. E. 2d 1169 (Ill. App. Ct. 1978).

In the context of law enforcement entering commercial premises without a warrant pursuant to a routine after-hours security check undertaken to protect the interests of the property owner, the Alaska Supreme Court considered whether the officers had reason to believe that the owner would not consent to such an entry. Because a reasonable officer would have concluded that the owner wished the officers to enter when they found an unlocked door, the court upheld the constitutionality of the search inside the premises.

State v. Myers, 601 P.2d 239, 243-44 (Alaska 1979). A reasonable DLI inspector would doubt that the owner of Anytime Fitness' premises would consent to a search through a locked external door on June 15, 2020.

The Fourth Amendment and article I, section 7 only preclude searches and seizures of property. DLI suggests that its inspectors engaged in no search. Our ruminating whether a search occurred harms DLI more than benefits it. According to the United States Supreme Court, a search occurs when the government obtains information by physically intruding on persons, houses, papers, or effects. *Florida v. Jardines*, 569 U.S. 1, 5, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013). Entering a locked door without a key and without consent constitutes an intrusion.

Our resolution of this appeal does not come easy. Sound arguments support DLI's position that its inspectors possessed authorization to enter the locked door by tailgating and whatever the inspectors saw while awaiting consent is admissible under the open view or plain view doctrine. The COVID-19 pandemic was a disaster unlike any the citizens of Washington have seen before. *Matter of Recall of Inslee*, 199 Wn.2d 416, 434, 508 P.3d 635 (2022). The disease constituted a potentially fatal workplace hazard. The Washington State Constitution mandates that the Legislature adopt workplace safety protections for Washington workers. WASH. CONST. art. II, § 35. Worker safety is

fundamental right. *Martinez-Cuevas v. DeRuyter Brothers Dairy, Inc.*, 196 Wn.2d 506, 519-20, 475 P.3d 164 (2020).

On June 15, 2020, the Anytime Fitness Selah facility displayed an open sign. Anytime Fitness proudly flaunted its violation of COVID-19 restrictions based on its belief in the unconstitutionality of the restrictions. Anytime Fitness took no steps to prevent tailgating by outsiders. Locked doors at a 24/7 fitness club serve to protect the physical safety of club members who enter the club at odd night or early morning hours, not necessarily to protect the privacy of members. Stacia Johnson and Steve Yunker entered during normal business hours.

DLI emphasizes that members of the public sat in the office to apply for a membership. We do not know how these individuals entered the fitness club. They likely gained consent to proceed beyond a locked door. When Jeff Mercer came to the fitness club and objected to DLI's search of the premises, the parties moved their discussion outside. We also observe that the locked doors serve the purpose, during normal business hours, to preclude trespassers that would otherwise be tolerated in another business fully open to the public.

We recognize, as argued by DLI, that RCW 49.17.070(1)(a) directs that L&I inspectors enter jobsites "without delay." Nevertheless, we emphasize that the DLI inspectors could have applied for a warrant to enter and search the Selah facility. RCW

49.17.075. They could have garnered the search warrant without having tipped off employees of Anytime Fitness that they sought to search the premises. No emergency excused the failure to apply for a warrant.

Police officers generally need a warrant to search a place in which a person has a reasonable expectation of privacy. *Franks v. Delaware*, 438 U.S. 154, 164, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). The bulwark of Fourth Amendment protection is the warrant clause, requiring that, absent certain exceptions, police obtain a warrant from a neutral and disinterested magistrate before embarking upon a search. *Franks v. Delaware*, 438 U.S. 154, 164 (1978). Under Article I, section 7 of the Washington Constitution, the authority of law required by that article is satisfied by a valid warrant. *State v. Miles*, 160 Wn.2d 236, 244, 156 P.3d 864 (2007).

The United States Supreme Court has noted some pervasively regulated industries wherein Fourth Amendment protections loosen because the government needs unannounced inspections to secure compliance with extensive regulations. These industries include alcohol and firearms. *United States v. Biswell*, 406 U.S. 311, 92 S. Ct. 1593, 32 L. Ed. 2d 87 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 90 S. Ct. 774, 25 L. Ed. 2d 60 (1970). No court has considered the fitness club industry to qualify for special search and seizure rules.

DLI encourages us to defer to the Board's finding of fact that the DLI inspectors entered a reasonably recognizable entry point. We consider this finding more in the nature of a conclusion of law. More importantly, assuming we accepted the finding, we would still conclude that entry through the locked door violated Bradshaw Development's rights under the Fourth Amendment and article 1, section 7.

The APA provides that the presiding officer of an adjudicatory hearing shall disregard evidence excludable on constitutional or statutory grounds. RCW 34.05.452(1). The exclusionary rule requires suppression of evidence obtained as the result of an unconstitutional search. *Centimark Corp. v. Department of Labor & Industries of Washington*, 129 Wn. App. 368, 374 (2005). The ALJ, and in turn the Board, should have rejected any testimony of the DLI inspectors as to their observations inside the Selah facility.

In the conclusion of its brief, Bradshaw Development seeks an award of reasonable attorney fees and costs incurred during this proceeding. Nevertheless, Bradshaw Development provided no citation to authority that supports an award. RAP 18.1(a) and (b) require a party seeking reasonable attorney fees and costs to devote a section of its opening brief to detailing the basis on which the court should award fees. Because Bradshaw Development failed to follow this rule, we decline its request.

CONCLUSION

We affirm the superior court's ruling dismissing the citation issued against Bradshaw Development on June 15, 2020. We deny Bradshaw Development an award of reasonable attorney fees and costs.

Fearing, J.

WE CONCUR:

Cooney, J.

Staab, A.C.J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

BRADSHAW DEVELOPMENT, INC. d/b/a ANYTIME FITNESS,	)	No. 40360-2-III
Appellant,	)	ORDER: (1) GRANTING IN PART MOTION FOR RECONSIDERATION, AND (2) AMENDING OPINION
v.	)	
WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES,	)	
Respondent.	)	

THE COURT has considered the respondent's motion for reconsideration of our June 26, 2025, opinion; and the record and file herein.

IT IS ORDERED that the respondent's motion for reconsideration is granted in part. The first full paragraph on page 13 of the June 26, 2025, opinion is stricken and replaced with the following:

> "In a WISHA (Washington Industrial Safety and Health Act of 1973, chapter 49.17 RCW) appeal, we review the Board's decision directly based on the record before the Board." *Potelco, Inc. v. Department of Labor & Industries*, 191 Wn. App. 9, 21, 361 P.3d 767 (2015) (citing *Pilchuck Contractors, Inc. v. Department of Labor & Industries*, 170 Wn. App. 514, 516, 286 P.3d 383 (2012)). Because Bradshaw Development does not challenge the Board's

> findings of fact, they are verities. *Dodge City Saloon, Inc. v. Washington State Liquor Control Board*, 168 Wn. App. 388, 395, 288 P.3d 343 (2012).

PANEL: Judges Fearing, Staab, and Cooney

FOR THE COURT:

ROBERT LAWRENCE-BERREY
Chief Judge

No. 104579-4

SUPREME COURT
STATE OF WASHINGTON

BRADSHAW DEVELOPMENT, INC. dba ANYTIME FITNESS, Respondent, v. WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, Petitioner.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Dept.'s Revised Petition for Review and this Certificate of Service in the below described manner:

E-Filing via Washington State Appellate Courts Portal:

Sarah R. Pendleton Supreme Court Clerk
Washington State Supreme Court

E-Mail via Washington State Appellate Courts Portal:

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DATED this 15th day of Semptember, 2025.

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