

# Letter B

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June 18, 2018

### VIA EMAIL AND OVERNIGHT MAIL

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**Re: Comments on the Initial Study / Mitigated Negative Declaration for 1015 South Bascom Avenue Assisted Living Facility Project, San Jose (CP17-046)**

Dear Ms. Hughey and Mr. Le:

We write on behalf of the **San Jose Residents for Responsible Development** ("San Jose Residents") to provide comments on the Initial Study and Mitigated Negative Declaration ("MND") prepared by the City of San Jose ("City") for the 1015 South Bascom Avenue Assisted Living Facility Project (CP17-046) ("Project"), proposed by US Alliance Holden of San Jose, LLC ("Applicant").

The Project would be located at 1015 South Bascom Avenue, in San Jose. The Applicant is seeking a Conditional Use Permit for the development of approximately 165 assisted living units (192 beds) in a six-story building over a below grade podium parking garage. The facility will be a fully licensed Residential Care Facility for the Elderly ("RCFE"), regulated by the State of California. The proposed building will consist of approximately 156,022 square feet of assisted living units, approximately 5,200 square feet of commercial retail uses on the

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ground floor, a six-story concrete structure over a 46,854 square foot below-grade podium parking garage, and will be at a maximum height of 85 feet (with parapet).

Based upon our review of the MND and the available documents, we conclude that the MND fails to comply with the requirements of the California Environmental Quality Act<sup>1</sup> (“CEQA”). The MND fails to identify and explain the Project’s potentially significant environmental impacts and propose enforceable measures that can reduce those impacts to a less than significant level.

As explained in these comments, there is more than a fair argument that the Project will result in potentially significant public health impacts from construction emissions. The City may not approve the Project until it prepares an environmental impact report (“EIR”) that adequately analyzes the Project’s potentially significant direct, indirect and cumulative impacts, and incorporates all feasible mitigation measures to avoid or minimize these impacts.

We prepared these comments with the assistance of air quality expert James J. Clark, Ph.D. of Clark and Associates (“Clark”). Dr. Clark’s technical comments and curricula vitae are attached hereto as **Attachment A**.<sup>2</sup> San Jose Residents reserves the right to supplement these comments at later hearings and proceedings related to this Project.<sup>3</sup>

## I. STATEMENT OF INTEREST

San Jose Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety standards and environmental impacts associated with Project development. San Jose Residents includes the **International Brotherhood of Electrical Workers Local 332, Plumbers & Steamfitters Local 393, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483**, and their members and families,

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<sup>1</sup> Pub. Resources Code §§ 21000 et seq.; 14 Cal. Code Regs. §§ 15000 et seq. (“CEQA Guidelines”).

<sup>2</sup> **Attachment A**: Letter from James J.J. Clark, Ph.D. to Linda Sobczynski re: Comment Letter on Proposed Residential Care Facility for the Elderly (RCFE) Project, 1015 South Bascom Avenue, San Jose, CA Draft Mitigated Negative Declaration and Initial Study Report, June 18, 2018 (“Clark Comments”).

<sup>3</sup> Gov. Code, § 65009(b); Pub. Resources Code, § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield* (2004) 124 Cal.App.4th 1184, 1199-1203; *see Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal.App.4th 1109, 1121.



and other individuals that live and/or work in the City of San Jose and Santa Clara County.

Individual members of San Jose Residents and the affiliated labor organizations live, work, recreate and raise their families in the City of San Jose and Santa Clara County. They would be directly affected by the Project's environmental and health and safety impacts. Individual members may also work on the Project itself. Accordingly, they will be first in line to be exposed to any health and safety hazards that exist onsite. San Jose Residents have a strong interest in enforcing the State's environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for business and industry to expand in the region, and by making it less desirable for businesses to locate and people to live there.

## II. AN EIR IS REQUIRED

CEQA requires that lead agencies analyze any project with potentially significant environmental impacts in an EIR.<sup>4</sup> "Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions *before* they are made. Thus, the EIR protects not only the environment, but also informed self-government."<sup>5</sup> The EIR has been described as "an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return."<sup>6</sup>

CEQA's purpose and goals must be met through the preparation of an EIR, except in certain limited circumstances.<sup>7</sup> CEQA contains a strong presumption in favor of requiring a lead agency to prepare an EIR. This presumption is reflected in the "fair argument" standard. Under that standard, a lead agency "shall" prepare an EIR whenever substantial evidence in the whole record before the agency supports a fair argument that a project may have a significant effect on the environment.<sup>8</sup>

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<sup>4</sup> See Pub. Resources Code § 21000; CEQA Guidelines § 15002.

<sup>5</sup> *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564 (internal citations omitted).

<sup>6</sup> *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

<sup>7</sup> See Pub. Resources Code § 21100.

<sup>8</sup> Pub. Resources Code §§ 21080(d), 21082.2(d); CEQA Guidelines §§ 15002(k)(3), 15064(f)(1), (h)(1); *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1993) 6 Cal.4th 1112, 1123; *No Oil*,



In contrast, a mitigated negative declaration may be prepared only when, after preparing an initial study, a lead agency determines that a project may have a significant effect on the environment, but:

(1) revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review *would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur*, and (2) there is *no substantial evidence* in light of the whole record before the public agency that the project, as revised, *may* have a significant effect on the environment.<sup>9</sup>

Courts have held that if “no EIR has been prepared for a nonexempt project, but substantial evidence in the record supports a fair argument that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR.”<sup>10</sup> The fair argument standard creates a “low threshold” favoring environmental review through an EIR, rather than through issuance of a negative declaration.<sup>11</sup> An agency’s decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.<sup>12</sup>

“Substantial evidence” required to support a fair argument is defined as “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.”<sup>13</sup> According to the CEQA Guidelines, when determining

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*Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 82; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151; *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1601-1602.

<sup>9</sup> Pub. Resources Code § 21064.5 (emphasis added).

<sup>10</sup> See, e.g., *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319-320.

<sup>11</sup> *Citizens Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754.

<sup>12</sup> *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th, 1307, 1318; see also *Friends of B Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002 (“If there was substantial evidence that the proposed project might have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration, because it could be ‘fairly argued’ that the project might have a significant environmental impact”).

<sup>13</sup> CEQA Guidelines § 15384(a).



whether an EIR is required, the lead agency is required to apply the principles set forth in Section 15064, subdivision (f):

[I]n marginal cases where it is not clear whether there is substantial evidence that a project may have a significant effect on the environment, the lead agency shall be guided by the following principle: If there is disagreement among expert opinion supported by facts over the significance of an effect on the environment, the Lead Agency shall treat the effect as significant and shall prepare an EIR.

Furthermore, CEQA documents, including EIRs and MNDs, must mitigate significant impacts through measures that are “fully enforceable through permit conditions, agreements, or other legally binding instruments.”<sup>14</sup> Deferring formulation of mitigation measures to post-approval studies is generally impermissible.<sup>15</sup> Mitigation measures adopted after Project approval deny the public the opportunity to comment on the Project as modified to mitigate impacts.<sup>16</sup> If identification of specific mitigation measures is impractical until a later stage in the Project, specific performance criteria must be articulated and further approvals must be made contingent upon meeting these performance criteria.<sup>17</sup> Courts have held that simply requiring a project applicant to obtain a future report and then comply with the report’s recommendations is insufficient to meet the standard for properly deferred mitigation.<sup>18</sup>

With respect to this Project, the MND fails to satisfy the basic purposes of CEQA. The City failed to adequately investigate, analyze, and disclose the Project’s potentially significant impacts. Therefore, the City’s conclusions that the Project will have less than significant air quality and public health impacts are unsupported.<sup>19</sup> Whereas the City lacks substantial evidence to support its conclusions, Dr. Clark provides substantial evidence that the Project may result in

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<sup>14</sup> CEQA Guidelines § 15126.4(a)(2).

<sup>15</sup> *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309; Pub. Resources Code § 21061.

<sup>16</sup> *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1393; *Quail Botanical*, *supra*, 29 Cal.App.4th at p. 1604, fn. 5.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Pub. Resources Code § 21064.5; MND, pp. 31-36.



potentially significant public health impacts from construction emissions.<sup>20</sup> Therefore, a fair argument can be made that the Project may cause significant impacts requiring the preparation of an EIR.

### **III. THERE IS A FAIR ARGUMENT THAT THE PROJECT MAY RESULT IN SIGNIFICANT IMPACTS THAT REQUIRE THE CITY TO PREPARE AN EIR**

Under CEQA, a lead agency must prepare an EIR whenever substantial evidence in the whole record before the agency supports a fair argument that a project may have a significant effect on the environment.<sup>21</sup> The fair argument standard creates a “low threshold” favoring environmental review through an EIR, rather than through issuance of a negative declaration.<sup>22</sup> An agency’s decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.<sup>23</sup> Substantial evidence can be provided by technical experts or members of the public.<sup>24</sup> “If a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect.”<sup>25</sup>

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<sup>20</sup> Clark Comments, pp. 4, 7.

<sup>21</sup> Pub. Resources Code § 21082.2; CEQA Guidelines § 15064(f), (h); *Laurel Heights II*, *supra*, 6 Cal. 4th at p. 1123; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal. 3d 68, 75, 82; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151; *Quail Botanical*, *supra*, 29 Cal.App.4th at pp. 1601-1602.

<sup>22</sup> *Citizens Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754.

<sup>23</sup> *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th, 1307, 1318; *see also Friends of B Street*, *supra*, 106 Cal.App.3d at p. 1002 (“If there was substantial evidence that the proposed project might have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an [environmental impact report] and adopt a negative declaration, because it could be ‘fairly argued’ that the project might have a significant environmental impact”).

<sup>24</sup> See, e.g., *Citizens for Responsible and Open Government v. City of Grand Terrace* (2008) 160 Cal.App.4th 1323, 1340 (substantial evidence regarding noise impacts included public comments at hearings that selected air conditioners are very noisy); *see also Architectural Heritage Assn. v. County of Monterey*, 122 Cal.App.4th 1095, 1117-1118 (substantial evidence regarding impacts to historic resource included fact-based testimony of qualified speakers at the public hearing); *Gabric v. City of Rancho Palos Verdes* (1977) 73 Cal.App.3d 183, 199.

<sup>25</sup> CEQA Guidelines § 15062(f).



**A. The City lacks substantial evidence to support its air quality analysis because the Air Quality Assessment contains multiple flaws and cannot be relied upon.**

The City relies upon the severely flawed Illingworth & Rodkin, Inc.'s Air Quality Assessment to evaluate the Project's air quality impacts and conclude that the Project would have less than significant impacts on air quality with implementation of identified standard permit conditions and compliance with General Plan Policies.<sup>26</sup> The City did not propose any project-specific mitigation measures. The City lacks substantial evidence to support its air quality analysis because the Air Quality Assessment that the City relies upon contains numerous flaws.<sup>27</sup>

**First**, Dr. Clark reviewed the Air Quality Assessment and found that, according to it, the Project will use electric/alternative-fueled equipment and tools during construction.<sup>28</sup> Electric/alternative-fueled equipment reduces the Project's construction emissions.<sup>29</sup> However, there is no mitigation measure, or any other legally binding instrument that requires the use of electric/alternative-fueled equipment and tools.<sup>30</sup> In other words, there is no way to compel the Applicant to actually use the lower emitting equipment during construction. Without enforceable mitigation, the Project's actual emissions are higher than they are reported in the Air Quality Assessment. The City cannot rely upon the air quality analysis — with its artificially reduced emissions based on voluntary measures — and must prepare an EIR that accurately and adequately discloses, analyzes and mitigates the Project's impacts from construction emissions.

**Second**, Dr. Clark found that the Air Quality Assessment assumes that the Applicant will use an all Tier 4 construction fleet.<sup>31</sup> Tier 4 equipment is cleaner than its lower tier counterparts.<sup>32</sup> However, Tier 4 equipment is also more expensive and not as readily available as lower tier equipment. Dr. Clark explains

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<sup>26</sup> MDN, p. 39.

<sup>27</sup> Clark Comments, p. 2.

<sup>28</sup> Clark Comments, pp. 2-3.

<sup>29</sup> Clark Comments, pp. 2-3.

<sup>30</sup> Mitigation measures must be "fully enforceable through permit conditions, agreements, or other legally binding instruments." CEQA Guidelines § 15126.4(a)(2).

<sup>31</sup> Clark Comments, p. 3.

<sup>32</sup> Clark Comments, p. 3.



“it is very unlikely” that the Applicant will find a sufficient number of Tier 4 equipment.<sup>33</sup> Thus, similar to the electric/alternative-fueled equipment issue above, the Project’s emissions will be higher if the Applicant uses lower tier equipment. Unless there is an enforceable permit condition requiring an all Tier 4 construction fleet, the City cannot rely upon the air quality analysis because the Project’s emissions are much higher. The City must prepare an EIR that accurately and adequately discloses, analyzes and mitigates the Project’s impacts from construction emissions.

**Third**, Dr. Clark comments that the Air Quality Assessment uses the California Emissions Estimator Model (“CalEEMod”) to estimate emissions. But in doing so, the City underestimated the emissions of PM<sub>10</sub> and PM<sub>2.5</sub>.<sup>34</sup> CalEEMod provides recommended default values based on site-specific information, such as land use type, meteorological data, total lot acreage, project type and typical equipment associated with a project type. If more specific project information is known, the user can change the default values and input project-specific values, but CEQA requires that such changes be justified by substantial evidence.<sup>35</sup> Once all of the values are inputted into the model, the project’s construction and operational emissions are calculated, and “output files” are generated. These output files disclose to the reader what parameters were used in calculating the emissions, including which values were changed.

Dr. Clark reviewed the Project’s CalEEMod output files and found that several values used are inconsistent with information in the MND.<sup>36</sup> For example, the City provides no support whatsoever for why the length of each truck trip is significantly shorter than those assumed in the default evaluation (0.5 miles instead of 7.3 miles or 20 miles).<sup>37</sup> As another example, the City provides no support why the default emission rates for each piece of equipment are not used. As described above, any changes from the default values must be justified by substantial evidence.<sup>38</sup> When Dr. Clark redid the CalEEMod modeling to include substantiated values, the PM<sub>10</sub> and PM<sub>2.5</sub> emissions increased *tenfold and sixfold*,

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<sup>33</sup> Clark Comments, p. 3.

<sup>34</sup> Clark Comments, p. 4.

<sup>35</sup> CalEEMod User Guide, p. 2, 9, available at: <http://www.caleemod.com/>

<sup>36</sup> Clark Comments, p. 4.

<sup>37</sup> Clark Comments, p. 4.

<sup>38</sup> Clark Comments, p. 4.



respectively.<sup>39</sup> Specifically, Project construction would result in PM<sub>10</sub> and PM<sub>2.5</sub> values of 358 pounds and 123.4 pounds, respectively.<sup>40</sup> These values are the *mitigated* values and are ten times and six times, respectively, the amount of emissions the City reports: 36 pounds of PM<sub>10</sub> and 26 pounds of PM<sub>2.5</sub>.<sup>41</sup> The implications of this drastic increase are discussed in further detail in Section B., below.

***In sum***, the City never evaluated the Project's actual emissions. As shown above, the City's analysis is riddled with assumptions that artificially reduce the Project's emissions. Without an accurate emissions estimate, the City has failed to disclose the Project's air quality impacts. The Project's construction related emissions are grossly underestimated, unsupported, and cannot be relied upon. The MND fails as an information disclosure document and the City cannot rely upon its air quality analysis to determine that there are less than significant air quality impacts.

**B. Substantial evidence supports a fair argument that the Project may result in potentially significant public health impacts from diesel particulate matter emissions.**

Construction equipment and heavy-duty truck traffic generate Diesel Particulate Matter ("DPM").<sup>42</sup> DPM is a known Toxic Air Contaminant ("TAC").<sup>43</sup> The City determined that the Project's public health impacts from construction emissions are less than significant.<sup>44</sup>

*1. The City lacks substantial evidence to support its public health analysis and impact conclusion.*

To evaluate the public health impacts from construction emissions, in addition to the CalEEMod modeling,<sup>45</sup> the City also conducted dispersion modeling using AERMOD, the U.S. EPA approved model, for calculating concentrations of

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<sup>39</sup> Clark Comments, p. 4.

<sup>40</sup> Clark Comments, p. 4.

<sup>41</sup> Clark Comments, p. 4.

<sup>42</sup> MND, p. 35; Clark Comments, pp. 5-6.

<sup>43</sup> MND, p. 35; Clark Comments, pp. 5-6.

<sup>44</sup> MND, p. 35.

<sup>45</sup> Clark Comments, p. 4.

DPM and PM<sub>2.5</sub>.<sup>46</sup> However, the City failed to include the model outputs for external review and validation.<sup>47</sup> The model outputs must be provided for the entire public review period pursuant to CEQA.<sup>48</sup> Without access to all documents referenced in the MND, the public cannot meaningfully review and comment on the MND's analyses and conclusions.

Next, the City failed to adequately assess the significant amounts of TACs that will be emitted during construction and operation.<sup>49</sup> Dr. Clark explains that air pollution from construction equipment is "already taking a heavy toll on the health and economic well-being of Californians."<sup>50</sup> Yet, the City failed to disclose the TACs that will be released at the site and failed to adequately address public health impacts from TAC emissions on the surrounding community.<sup>51</sup>

Finally, as Dr. Clark explains in his comments, the construction DPM emission estimates for the MND are based upon unsupported assumptions that also plague the air quality analysis discussed above.<sup>52</sup> For example, the City failed to substantiate why it deviated from the default emission rates for each piece of equipment.<sup>53</sup> When Dr. Clark conducted the CalEEMod modeling to include substantiated values, the DPM emissions increased *at least fourfold* from 34.0 pounds to 139.6 pounds.<sup>54</sup> The City's emissions estimates grossly underestimate DPM emissions and cannot be relied upon to determine the significance of the Project's public health impacts.<sup>55</sup>

2. *Dr. Clark provides substantial evidence that the Project would result in significant public health impacts.*

The City's own analysis showed that the Project would have a cumulative cancer health risk of 6.2 in 1,000,000, just below the CEQA significance threshold of

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<sup>46</sup> Clark Comments, p. 5.

<sup>47</sup> Clark Comments, p. 5.

<sup>48</sup> Pub. Resources Code § 21092(b)(1); CEQA Guidelines § 15064(g)(4).

<sup>49</sup> Clark Comments, pp. 5-6.

<sup>50</sup> Clark Comments, pp. 5-6.

<sup>51</sup> Clark Comments, pp. 5-6.

<sup>52</sup> Clark Comments, pp. 5-6.

<sup>53</sup> Clark Comments, pp. 4.

<sup>54</sup> Clark Comments, pp. 5-6.

<sup>55</sup> Clark Comments, p. 7.



10 in 1,000,000.<sup>56</sup> However, as explained above, Dr. Clark modeled DPM emissions with substantiated input values and found that DPM emissions are at least four times larger than reported.<sup>57</sup> This is consistent with Dr. Clark's observation regarding PM<sub>10</sub> and PM<sub>2.5</sub> emissions modeling discussed above.<sup>58</sup> Additionally, Dr. Clark provides substantial evidence that the health risk increases proportionally with the amount of DPM released.<sup>59</sup> Consequently, Dr. Clark provides substantial evidence that the health risk would be four times what the City reports for an estimated 24 in 1,000,000 cancer health risk.<sup>60</sup> This figure is more than double the CEQA significance threshold.

Dr. Clark provides substantial evidence supporting a fair argument that the Project may have a potentially significant public health risk.<sup>61</sup> As a result, the City must prepare an EIR to evaluate this significant health risk. The EIR should include mitigation measures to reduce the Project's health risk impacts to a less than significant level.

#### IV. CONCLUSION

There is substantial evidence supporting a fair argument that the Project may result in potentially significant adverse public health impacts that were not identified in the MND, and thus have not been adequately analyzed or mitigated.<sup>62</sup> We urge the City to fulfill its responsibilities under CEQA by withdrawing the MND and preparing a legally adequate EIR to address the potentially significant impacts described in this comment letter and the attached letter from Dr. Clark. This is the only way the City and the public will be able to ensure that the Project's significant environmental impacts are mitigated to less than significant levels.

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<sup>56</sup> Clark Comments, p. 7.

<sup>57</sup> Clark Comments, p. 5.

<sup>58</sup> Clark Comments, p. 4.

<sup>59</sup> Clark Comments, p. 7.

<sup>60</sup> Clark Comments, p. 7.

<sup>61</sup> Clark Comments, p. 7.

<sup>62</sup> Clark Comments, p. 4 ("To protect air quality and public health the City must prepare an EIR for the Project.").

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Thank you for your attention to these comments.

Sincerely,

A handwritten signature in blue ink, reading "Linda Sobczynski", is placed on a light yellow rectangular background.

Linda T. Sobczynski

LTS:ljl

Attachment