Date: January 15, 2019

To: Village Board of Chestnut Ridge

From: Citizens United to Protect our Neighborhoods of Chestnut Ridge ("**CUPON**")

Re: CUPON Statement on the Religious Land Use and Institutionalized Persons Act (**RLUIPA**)

Executive Summary

Chestnut Ridge has proposed making extraordinary changes to its zoning laws with regard to houses of worship (the "**Proposed Zoning Changes**"). These changes were described originally in early 2018. Those proposed changes were then modestly modified and a new set of Proposed Zoning Changes was released on August 29, 2018. Additional modest revisions were added at the end of December. Throughout the entire process, the Mayor and Village Board have cited **RLUIPA** as a primary reason for making these changes. Repeatedly, the Mayor has claimed that **RLUIPA** in fact mandates the proposed changes. CUPON, on advice of its attorneys, states that is simply false.

To be clear, nothing in **RLUIPA** requires—***or even suggests***—that a village, town, or city must change its zoning laws. **RLUIPA** simply requires that the permitting and variance process be carried out in a nondiscriminatory manner that does not place substantial burdens on religious practice. The Proposed Zoning Changes are exceedingly broad and open nearly the entire Village up to religious use in a way that will forever change the Village. **RLUIPA** requires nothing of the sort.

Moreover, the Proposed Zoning Changes would not even shield the Village from potential **RLUIPA** claims. When someone is denied a variance or conditional use permit relating to the construction or work on a Residential Gathering Place, a Neighborhood Place of Worship, or a Community Place of Worship (for, example making the structure larger), the Village will potentially face a **RLUIPA** claim. Again, the key to avoiding liability is to treat everyone fairly in the permitting and variance process. Lastly, if the goal of the Village is to avoid litigation, the Village Board should be very concerned about a potential lawsuit under the Establishment Clause should it adopt the sweeping Proposed Zoning Changes, particularly given the fact that the stated reason for adopting the Proposed Zoning Changes specifically related to one religious community's needs and were drafted with the consultation of that religious community.

While CUPON believes that the Village should review and modernize its zoning laws, permitting process and enforcement procedures, it strongly urges the Village Board not to enact the Proposed Zoning Changes. Instead, the Village should go through the process of adopting a formal comprehensive plan, consistent with Federal and New York State law (including **RLUIPA**) but also consistent with the Establishment Clause of the United States Constitution, which prevents local, state or national government from favoring one religion over others or over secular activity.

The comprehensive plan must address the needs of all members of the community, including all religious communities, but it must do so in light of the law and the Constitution.

Background on RLUIPA

RLUIPA was enacted in 2000 shortly after the Supreme Court of the United States decided the Religious Freedom Restoration Act ("**RFRA**") was unconstitutional. The relevant provisions of **RLUIPA,** which the Mayor and the Village Attorney often refer to when arguing for the Proposed Zoning Changes, have not been tested at the Supreme Court, and there is vigorous national debate about whether those portions of **RLUIPA** are in fact constitutional. CUPON, at this time, is not opining on the constitutionality of the land use provisions of **RLUIPA**. This document instead describes what **RLUIPA** requires and why it does not require the Proposed Zoning Changes.

RLUIPA forbids local governments from imposing or implementing land use regulations in a manner that "imposes a substantial burden on the religious exercise of . . . a religious assembly or institution." This is often called the "*substantial burden*" provision.

RLUIPA forbids local governments from imposing or implementing land use regulations in "a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." This is often called the "*equal terms*" provision.

RLUIPA bars restrictions that totally exclude religious assemblies from a jurisdiction or discriminate "against any assembly or institution on the basis of religion or religious denomination."

RLUIPA bars discrimination among religions. The Village of Chestnut Ridge has never been accused of such a violation during its entire history of applying the existing zoning laws.

RLUIPA also contains a safe harbor provision that allows a local government that is subject to a legal challenge under the statute to address any zoning provision or practice that allegedly violates the statute. The provision broadly states:

> A government may avoid the preemptive force of any provision of this chapter by changing the policy or practice that results in a substantial burden on

> religious exercise, by retaining the policy or practice and exempting the substantially burdened exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

42 U.S.C. § 2000-c3(e). This provision gives local governments sweeping authority to take corrective action to avoid any potential liability, and the courts have held that this provision applies to all types of RLUIPA claims, not just substantial burden claims. *See, e.g.*, *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 762 (7th Cir. 2003) (finding that the City's amendments placing churches on an equal footing with nonreligious assembly uses corrected any violation of the nondiscrimination provision and that religious institutions must go through the same land use processes as other land users).

RLUIPA is only triggered if there has been an individualized assessment. *See, e.g.*, *Westchester Day Sch.*, 504 F.3d at 354. The plain language of the statute makes clear that ***it does not apply directly to land use regulations that are written in general and neutral terms***. But when the zoning code is applied to grant or deny a certain use to a particular parcel of land, that application is an 'implementation' under 42 U.S.C. § 2000cc(a)(2)(C). *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, 280 F. Supp. 3d 426, 469 (S.D.N.Y. 2017) (quoting *Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*, 456 F.3d 978, 986 (9th Cir. 2006)).

Two broad types of challenges to zoning ordinances may be made under **RLUIPA**: "facial" and "as-applied." Facial challenges contest the legal validity of laws based on their plain text. A facial challenge may arise where a zoning ordinance is not neutral and not generally applicable but specifically targets and applies to religious uses.[1] That is clearly not the case with regard to Chestnut Ridge's current zoning laws.

"As-applied" challenges involve local governments' *application* of zoning ordinances to a particular use and user. **RLUIPA** claims challenging specific decisions on applications for zoning relief fall under the as-applied variety, as do cease and desist orders. For these claims, the party seeking relief from the zoning ordinance must usually first obtain a final determination about the use of the property, including an exhaustion of the variance process. Under extreme circumstances, a court may adjudicate **RLUIPA** claims, even if the religious entity or individual did not seek a variance, if both: (1) the religious entity suffered a clear and immediate injury from some action by the government; and (2) those injuries were absolutely clear and would not be further defined by additional administrative proceedings. *Dougherty v. N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 90 (2d Cir. 2002). The Second Circuit concluded that a property owner's failure to appeal a cease and desist order to a local zoning board doomed his case because his injuries were not well defined. *Murphy v.New Milford Zoning Comm'n*, 402 F.3d 342, 352 (2d Cir. 2005) ("Bypassing the Zoning Board of

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[1] These sorts of claims are generally ripe for adjudication at any time. *Congregation Rabbinical College of Tartikov, Inc. v. Vill. of Pomona*, 915 F. Supp. 2d 574, 595 (S.D.N.Y. 2016) ("facial challenges to regulation[s] are generally ripe the moment the challenged regulation or ordinance is *passed*.") (emphasis added) (internal citations removed).

Appeals and its hearing processes, which were statutorily designed for exploration and development of these sorts of issues, leaves the Murphys' alleged injuries ill-defined.").

Indeed, "**RLUIPA** is not reached unless a party demonstrates a substantial burden on religious exercise, or religious discrimination or exclusion." *Castle Hills First Baptist Church v. City of Castle Hills*, 2004 U.S. Dist. LEXIS 4669, at *74 (W.D. Tx. 2004) (the Court went on to state that the law ***does not require local governments to legislate on behalf of the federal government***).

Substantial Burden Claims

Courts consider various factors to determine if a "substantial burden" exists, such as whether: governmental action is arbitrary and capricious; there are ready and feasible alternatives available for religious use; there was a reasonable expectation to receive government approval for religious use; and any conditions have been imposed that limit the religious use, among others. *Chabad Lubavitch of Litchfield Cty., Inc. v. Litchfield Historic Dist. Comm'n*, 768 F.3d 183, 195-196 (2d Cir. 2014). A Federal District Court in Maryland recently ruled that a reverend did not plead a substantial burden claim where she did not have a reasonable expectation when she purchased the property that it could be used for a church. *Jesus Christ is Answer Ministries, Inc. v. Balt. Cty.*, 303 F. Supp. 3d 378, 396 (D.C. Md. 2018) (where the property was a single-family dwelling located in a residential neighborhood, and, although a church was a use permitted as of right under the zoning ordinances, the church would still have to comply with the dwelling-type and other supplementary use restrictions). The Court emphasized that **RLUIPA** ***does not grant automatic exceptions to religious organizations from generally applicable land use regulations***, and that the courts should consider whether a plaintiff reasonably believed it would be permitted to undertake proposed modifications when the property was purchased in weighing any delay, uncertainty, or expense. *Id.* at 396-97 (quoting *Chabad Lubavitch of Litchfield Cty., Inc. v. Litchfield Historic Dist. Comm'n*, 768 F.3d 183, 196 (2d Cir. 2014)).

Also significant is whether the zoning ordinance is neutral and generally applicable or whether the ordinance "coerces the religious institution to change its behavior." *Westchester Day Sch. v. Village of Mamaroneck*, 504 F.3d 338, 352-53 (2d Cir. 2007) (finding a substantial burden where the village denied an Orthodox Jewish group's special permit to expand its day school because of a lack of feasible alternatives where the school's experts testified that the planned location of the expansion was the *only* site that would accommodate the new building). ***Where the issue is merely one of financial cost and inconvenience, or the "frustration of not getting what one wants," courts have determined that does not qualify as a substantial burden.*** *Castle Hills First Baptist Church v. City of Castle Hills*, 2004 U.S. Dist. LEXIS 4669, at *11 (W.D. Tex. 2004); *see also Midrash Sephardi, Inc. v. Town of Surfside*, 336 F.3d 1214, 1227 (11th Cir. 2004) (finding that having to walk a few blocks farther to a synagogue, even if some congregants were ill, or very young or old, did not constitute a substantial burden within the meaning of RLUIPA); *Chabad Lubavitch of Litchfield Cty. v. Borough of Litchfield*, 2017 U.S. Dist. LEXIS 181656, at *72-77 (D.C. Conn. 2017).

The Connecticut District Court weighed whether the denial of a permit for a Rabbi's personal residence to be located in the Chabad House violated **RLUIPA** and acknowledged

that the location of the Rabbi's residence a couple of blocks away would be most burdensome on the Sabbath, when the use of cars and telephones is not permitted. *Chabad Lubavitch*, 2017 U.S. Dist. LEXIS 181656,. at *73-74. Nevertheless, the Court concluded that physical presence inside the Chabad House did not share a close nexus with the Chabad's religious exercise, hence there was no substantial burden with respect to that portion of plaintiffs' proposed use. *Id.* The Court recognized that it was "theoretically possible that there are no properties available within walking distance of 85 West Street, or that the prices are prohibitive," but even assuming that would be a substantial burden, the Court held that the plaintiffs failed to demonstrate that those circumstances existed.

Even if a plaintiff was able to establish a substantial burden, a local government may nevertheless defeat a substantial claim if it can demonstrate that the burden advances a compelling interest in the least restrictive means possible. To succeed at that stage, the government must at least present evidence that it considered alternatives that would protect the compelling interest (whether public health, safety, or general welfare) while lessening the burden on religion. *Westchester Day Sch.*, 504 F.3d at 353. Indeed, preserving the rural and rustic, single-family residential character of a residential zone has been deemed a compelling interest. *Eagle Cove Camp & Conference Ctr., Inc. v. Town of Woodboro*, 734 F.3d 673 (7th Cir. 2013).

Equal Terms Claims

Equal terms claims typically arise where a zoning district appears to treat religious uses worse than analogous secular uses, either based on the text of the zoning ordinances, or as applied to a particular circumstance. For example, if a religious use is subject to a stricter process in seeking a permit than a secular use, there may be an equal terms violation. *Corp. of Catholic Archbishop of Seattle v. City of Seattle*, 28 F. Supp. 3d 1163 (W.D. Wash. 2014). In order to determine whether a religious group is treated on "less than equal terms" courts generally compare the two types of entities and how each is treated on the face of the zoning ordinance or in its application. *Third Church of Christ, Scientist, of New York City v. City of New York*, 626 F.3d 667, 669 (2d Cir. 2010). If zoning ordinances prohibit religious uses but allow secular uses for clubs, auditoriums, recreational facilities, theaters, community centers, etc., some courts have found a RLUIPA violation. *Midrash Sephardi*, 366 F.3d at 1231-32; *contra Tree of Life*, 2017 WL 4563897, at *13 (S.D. Ohio 2017) (upholding a city's zoning ordinance prohibiting a religious school in a business zone where other secular assembly uses were allowed because the business zone's stated purpose was to generate tax income). The District Court for the Southern District of New York summarized the three types of equal terms violations: (1) a statute that facially differentiates between religious and secular assemblies or institutions; (2) a facially neutral statute that is nevertheless gerrymandered to place a burden solely on religious, as opposed to secular, assemblies or institutions; and (3) a truly neutral statute that is selectively enforced against religious, as opposed to secular, assemblies or institutions. *Congregation Rabbinical College of Tartikov, Inc. v. Vill. of Pomona*, 138 F. Supp. 3d 352, 441 (S.D.N.Y. 2015).

Where religious and secular uses are treated differently, the local government must justify the unequal treatment based on legitimate zoning concerns. To avoid the appearance of targeting religious uses for unequal treatment, local governments may point to justifications within its zoning ordinances, such as creating parking space, controlling traffic, generating

municipal revenue, or limiting a commercial zone to commercial use. *See, e.g.*, *River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367, 373 (7th Cir. 2010).

Nondiscrimination Claims

To establish a nondiscrimination claim under RLUIPA, a potential plaintiff must show evidence of discriminatory intent. *Chabad Lubavitch of Litchfield County, Inc. v. Litchfield Historic Dist. Comm'n*, 768 F.3d 183, 198 (2d Cir. 2014). Courts will look at different factors to assess discriminatory intent, such as: events leading up to the land use decision; the context when the decision was rendered; whether the permitting process strayed from set norms; statements made by the decision making body and the members of the public; reports issued to the decision making body; whether a discriminatory impact was foreseeable; and if less discriminatory alternatives were available. *Id.* at 199-200 (noting that while a religious comparison is not necessary to make out a nondiscrimination claim, a local government's treatment of certain religions better than others could be evidence of discrimination).

Exclusions and Limits

RLUIPA imposes two requirements under this provision: (1) where space permits, religious uses should be allowed to locate somewhere in a jurisdiction, whether it is a single zoning district or multiple zones, and (2) local governments provide reasonable opportunities for religious uses to locate. In other words, a locality cannot place unreasonable limitations on religious uses within its jurisdiction. They may, however, limit the land available to religious organizations through limits on districts where the religious uses may operate, whether uses are allowed as-of-right or by special permit, or requirements for minimum bulk, density, and dimension for religious buildings. *See, e.g.*, *United States v. Bensalem Township*, 220 F. Supp. 3d 615, 622 (E.D. Pa. 2016) (finding that allegations that no parcels are available for purchase or lease by a religious organization in a zoning district could support a RLUIPA claim). For jurisdictions that are "close to being built to capacity, evidence that numerous religious uses are already operating can provide a powerful defense to total exclusion and unreasonable limits claims." Evan J. Seeman, et al., *Local Government Regulation of Religious Land Uses Under RLUIPA* 6, PRACTICAL LAW (2018).

Analysis

Chestnut Ridge's current zoning laws do not and have not violated any of these requirements. They do not impose a substantial burden on religious practice; they do not violate the equal terms provision; they do not exclude religious assemblies; and they do not discriminate based upon a particular religion.

The current zoning laws do include land use restrictions on all types of land use including houses of worship such as minimum land size, fire and safety provisions, parking and traffic requirements which have been in place since Chestnut Ridge was formed. These land use rules have not stifled the formation and healthy diversity of the many houses of worship in the Village. Further, there is a fair and public process in place for any land use including religious to get variances to meet a specific need, for example the use of a house for small religious services or the construction of a community house of worship on a lot that is smaller than authorized in the existing code. The Proposed Zoning Changes instead

provides blanket variances for houses of worship and sidesteps the Zoning Board of Appeals. ***This is NOT required by* RLUIPA**.

The Second Circuit has stated: "We do not believe **RLUIPA** directly compels states to require or prohibit any particular acts. Instead, **RLUIPA** leaves it to each state to enact and enforce land use regulations as it deems appropriate so long as the state does not substantially burden religious exercise in the absence of a compelling interest achieved by the least restrictive means." *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007). The Village is free to enact and enforce its zoning ordinances as it deems appropriate, but is not required to completely overhaul its existing land use regulations in order to comply with **RLUIPA**.

Since **RLUIPA** does not require local governments to take action, but includes a safe harbor provision for corrective action to be taken after the fact, that would be the most prudent course of action. The provision would allow the Village to address a religious applicant's complaints to leverage a favorable resolution while avoiding liability and extensive, expensive litigation.

In addition, **RLUIPA** does not purport to prescribe which means of eliminating a substantial burden must be chosen. The District Court for the Western District of Virginia agreed that the safe harbor provision was included by Congress to make clear that **RLUIPA** does not require a local government to adopt any particular measures, only that when the locality chooses to act, those actions do not violate **RLUIPA**. The Court explained that "the safe harbor provision embodies a congressional policy against federal micromanagement of a locality's land use decisions." *United States v. County of Culpeper*, 2017 U.S. Dist. LEXIS 142125, at *18-21 (W.D. Va. 2017) (where the government's suit against the County's denial of a sewage permit to an Islamic congregation was deemed moot because the County took remedial steps with the congregation of its own volition by creating nondiscrimination notices, creating a complaint process, and trained employees about religious discrimination).

Indeed, in the Department of Justice Statement on the Land Use Provisions of RLUIPA, the DOJ stated outright that **RLUIPA** is not a blanket exemption from zoning laws. *See also World Outreach Conference Ctr. v. City of Chicago*, 591 F.3d 531, 539 (7th Cir. 2009); *Sisters of St. Francis Health Servs. v. Morgan County*, 397 F. Supp. 2d 1032, 1051 (S.D. Ind. 2005) ("Interpretation of the substantial burden provision to prohibit every regulation limiting any use of property for religious purposes would render the word 'substantial' meaningless….Also, St. Francis' argument would effectively exempt any religious-based health care facility from otherwise valid certificate of need laws, which would seem to be a sweeping and unwarranted exemption. RLUIPA does not grant churches a blanket exemption from zoning laws."); 146 CONG. REC. S7776. To allow blanket variances for religious uses would run contrary to **RLUIPA's** aim to place religious and nonreligious uses on equal footing.

What **RLUIPA** *does* require is that the permitting and variance process be handled in an objective and nondiscriminatory manner that is consistent with each of the requirements described above. For example, when a proposed land use comes before the Planning Board or Zoning Board of Appeals seeking a variance to allow property to be modified and used

for religious purposes, these Boards must apply the zoning law fairly in a nondiscriminatory manner that recognizes and balances the property rights of nearby property owners and the public safety of the community at large. They cannot use zoning laws to frustrate a meritorious request for a variance.

Neither the Village Planning Board nor the Zoning Board of Appeals has a history or reputation for making improper decisions relating to proposed variances. Indeed, the most noteworthy religious use case they have addressed in recent years involved 3 Spring Hill Terrace where the owner requested and received a permit to build a three-car garage while being silent on the real intent to build a house of worship under the guise of a garage certificate of occupancy. ***Telling the truth about intended land use is NOT a substantial burden under RLUIPA.*** Within days of the ZBA decision to revoke the certificate of occupancy, the Village Attorney instructed the Building Inspector to issue a new slightly revised certificate of occupancy, thus negating the ZBA decision. It is no small wonder why the Proposed Zoning Changes avoid the ZBA process.

The Proposed Zoning Changes would create the as of right ability to designate that any house or property in any part of Chestnut Ridge can be converted or constructed as a residential gathering place or neighborhood house of worship. This sweeping change to a community where over 90% of the land in the Village has already been built on is simply a bridge too far and clearly NOT mandated by **RLUIPA**. These Proposed Zoning Changes provide a blanket variance for any house to be converted or built as residential gathering places or neighborhood houses of worship without any land size requirement. The hasty, very poorly drafted and unenforceable provisions of the Proposed Zoning Changes are NOT mandated by **RLUIPA**. Certainly, the tax base and marketability of Village property would suffer tremendously.

Indeed, favoring religious uses over secular uses, which is what the Proposed Zoning Changes do, is prohibited by the Constitution's Establishment Clause. *Congregation Rabbinical Coll. Of Tartikov, Inc. v. Vill. of Pomona*, 280 F. Supp. 3d 426 (S.D.N.Y. 2017); *see also CLUB*, 342 F.3d at 762 ("Otherwise, compliance with RLUIPA would require municipal governments not merely to treat religious land uses on an equal footing with nonreligious land uses, but rather to favor them in the form of an outright exemption from land-use regulations…no such free pass for religious land uses masquerades among the legitimate protections RLUIPA affords to religious exercise."); *WDS I*, 386 F.3d at 189 ("As a legislative accommodation of religion, RLUIPA occupies a treacherous narrow zone between the Free Exercise Clause, which seeks to assure that government does not interfere with the exercise of religion, and the Establishment Clause, which prohibits the government from becoming entwined with religion in a manner that would express preference for one religion over another, or religion over irreligion.").

The Village, then, is running the risk of violating the First Amendment's Establishment Clause by enacting such a drastic change to its zoning laws. Landowners often experience cost and inconvenience as part of the land use process, regardless of whether those landowners are religious or non-religious, as most zoning laws are neutral and of general applicability. Arguments of inconvenience and expense have been insufficient for landowners seeking to overturn negative zoning or land use decisions for a due process violation. In carrying out these proposed zoning laws, the Village is changing the character

of the majority of land within the Village without limit and entangling itself with religion, the effect of which is to advance religious interests over the secular in contravention of the Establishment Clause. The Clause contemplates that "sponsorship, financial support, and active involvement of the sovereign in religious activity" may be deemed establishment. *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 393 (1990); *Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664, 668 (1970).

Conclusion

CUPON urges the Village Board not to adopt the Proposed Zoning Changes as drafted. The Village Board's rationale for the changes—that they are somehow *mandated* by **RLUIPA**—is wrong. **RLUIPA** does not require the Proposed Zoning Changes.

Instead, CUPON believes that the Village Board should engage in a comprehensive plan process to adopt a formal Village Comprehensive Plan consistent with Federal and New York State law (including **RLUIPA**) but also consistent with the Establishment Clause of the United States Constitution, which prevents local, state or national government from favoring one religion over others or over secular activity.