[Question 1]

Do floodplain regulations, higher standards, or No Adverse Impact requirements expose communities to takings claims or other property rights challenges?

It depends. Legal challenges are always a possibility.

Regulations, Higher Standards, and NAI Requirements. State and local governments possess broad police power to protect public health, safety, and welfare using development regulations, performance standards, and other tools. Those requirements are generally upheld by the courts if they serve a public purpose, are reasonably necessary, and are not unduly oppressive. Regulations to protect against the harms of flooding typically receive very favorable treatment by courts because the public harms of flooding are so obvious, and regulations aimed at preventing damages from worsening flooding fit within traditional police-power concepts. Still, the underlying police power is subject to constitutional and state-law property protections, so legal challenges are always a possibility.

Well-documented, evidence-based, and well-written NAI requirements help communities avoid both flood losses and successful takings and property-rights claims. Courts have generally upheld floodplain rebuilding and compliance requirements for damaged non-conforming structures, including rules requiring rebuilt structures to meet current floodplain development standards after incurring Substantial Damage. [See e.g., https://no.floods.org/NAI-Legal, IV.C., Summary of Takings.]

Well-considered land use regulations and clear, defensible, open, reasonable, and understandable processes must be established by community consensus and be maintained. Comprehensive planning, public notice(s), and a clear record of objectives are necessary—especially for climate and flood-related regulations—to tie the regulations to important, legitimate public purposes. Communities are on stronger footing when ordinances clearly define thresholds, relationships to other land use and development control provisions, and the evidentiary basis for enforcement.

Communities risk legal challenges from regulation, but also from under-regulation or permitting development that results in flood damage. NAI requirements can operate as a liability reduction tool, preventing government-permitted adverse flooding impacts. [See e.g., https://no.floods.org/NAI-Legal, I.E., The NAI Approach; I.E.5., Reduced Liability.]

Potential Property Rights Challenges. One community's failure to make and document the required determination before enforcing its floodplain rule resulted in a judgment of a taking of property. Lawsuits are hard to avoid in land use regulation, and while well-designed floodplain regulations with higher standards generally withstand legal challenges, like any regulations, they can expose communities to regulatory takings claims, tort lawsuits, and due process challenges. [See e.g., https://no.floods.org/NAI-Legal, II.A. Lawsuits; IV.C., Summary of Takings; II.E.2.d.iv., Evidence Necessary to Declare Damage beyond 50% of Market Value.]

Regulatory Takings Claims. The most significant exposure comes from the Takings Clause of the Fifth Amendment to the U.S. Constitution that requires "just compensation" when a regulation goes so far in restricting the use of property that it is the legal equivalent of the government seizing the property for public purposes.

- Per Se Taking: A taking occurs if a regulation causes permanent physical occupation of property—e.g., permanent or inevitably recurring flooding from government action or infrastructure—or denies all economically beneficial use of the real property. [See e.g., https://no.floods.org/NAI-Legal, IV.B.2., Per Se Takings; IV.B.2.b., Per Se Taking by Elimination of Economically Beneficial Use: The Lucas Case.]
- Regulatory Taking: Most of these challenges are analyzed by the courts using the three-factor *Penn Central* test that evaluates the regulation's economic impact, its interference with "reasonable investment-backed expectations" and the "character of the government actions." [See e.g., https://no.floods.org/NAI-Legal, IV.B.5., Most Regulatory Takings: Penn Central Analysis; IV.B.5.c., Penn Central's 'Character of the Governmental Action' Factor; IV.B.5.d., Facets of 'Character of the Governmental Action'; IV.B.5.d., State of 'Nature of the Governmental Action' Today.]
- Exactions: When a community conditions a development permit on a property dedication or a fee, the exaction must meet the "essential nexus" and "rough proportionality" tests. [See e.g., https://no.floods.org/NAI-Legal, IV.B.4., Exactions; IV.B.4.b., Recommendations and Lessons for Floodplain Managers.]

Tort Liability. Communities may also be sued for civil harms, as when non-regulatory actions increase flooding. The most common torts involving flooding are negligence, nuisance, and trespass.

- Negligence: The most common tort in floodplain management, often involving claims of failed design or maintenance of drainage systems. [See e.g., https://no.floods.org/NAI-Legal, III.A., Negligence.]
- Nuisance: Property owners may sue if community projects like dikes or dams substantially interfere with their use of land. [See e.g., https://no.floods.org/NAI-Legal, III.C., Nuisance.]
- Trespass: Communities may be liable if they approve or develop projects that cause a physical invasion of real property through flooding. [See e.g., https://no.floods.org/NAI-Legal, III.B., Trespass to Land.]

Due Process. Additional exposure may arise if communities ignore the procedural or substantive requirements of the Fourteenth Amendment to the U.S. Constitution.

- Procedural Due Process: Challenges arise when regulations target property without providing the owners adequate notice of hearings and an opportunity to be heard.
- Substantive Due Process: Challenges arises when the community lacks "adequate reasons" for regulating property rights. Such challenges rarely prevail if a "conceivable rational basis" exists.

[See e.g., https://no.floods.org/NAI-Legal, IV.A., Fourteenth Amendment; IV.A.1., Conclusion.]

Real exposure arises, not just from the mere existence of higher standards, but also from how the land use regulations are adopted and applied. Some states provide broader property rights protections than the federal baseline. There are two related principles. First, property rights are not absolute; regulations that protect neighbors and the public from harmful land uses are not "anti-property-rights." Rather, they reflect how we, as a society, balance property rights and responsibilities when they come into conflict with each other. Second, NAI expressly supports approaches that decrease risks of flood losses and the potential for successful property-rights claims against communities. [See e.g., https://no.floods.org/NAI-Legal, IV.B.1., History, Context, and Development.]

Summary. Communities who implement sound flood protections—especially regulatory protections—may be sued, but inaction can create greater long-term liability exposure associated with greater flood risk to life and property. NAI approach-based regulations are more likely to reduce both flooding harms and the potential risk of successful property rights claims against communities who adopt and enforce higher public safety standards. Adopting properly drafted, clear higher standards, and implementing the regulations through appropriate procedures **should** lead to *successful* defense against takings or property-rights liability claims. When these land use regulations are—

- clearly grounded in the community's police powers;
- supported by an evidence-based comprehensive planning record tying the regulation to flood-risk reduction and public welfare;
- decision-makers follow required procedures; and
- regulations are carefully and consistently administered and enforced

—they should be highly defensible.